TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. [redacted]37.

OZAN LUMBER COMPANY, PETITIONER,

vs.

UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAY [redacted], 1908.
CERTIORARI AND RETURN FILED JUNE 11, 1908.

([redacted].263.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 299.

OZAN LUMBER COMPANY, PETITIONER,

vs.

UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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United States Circuit Court of Appeals, Eighth Circuit.

No. 2205.

OZAN LUMBER COMPANY, Plaintiff in Error,
vs.
UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Filed February 7, 1905.

1 Pleas before Hon. John H. Rogers, Judge of the United States District Court, sitting as Judge of the Circuit Court, for the Texarkana Division of the Western District of Arkansas on the 17th day of November A. D. 1904 in a case wherein Union County National Bank, of Liberty Indiana, was plaintiff and Ozan Lumber Company was defendant, in an action on promissory notes.

In the United States Circuit Court for the Western District of Arkansas Texarkana Division.

UNION COUNTY NATIONAL BANK OF LIBERTY INDIANA, Plaintiff,
vs.
OZAN LUMBER COMPANY, Defendant.

Complaint.

That the plaintiff complains and says:

That it is a corporation organized and doing business under the acts of Congress relating to National Banks, and is a citizen and resident of the State of Indiana, that the P. H. & F. M. Roots Company, hereinafter mentioned as payee on the notes herein sued upon was at the time said notes were executed and still is a corporation existing in and a citizen and resident of the said state of Indiana; that the defendant is, and at the time of the execution of said notes was, a corporation and a citizen and resident of the State of Arkansas, in the district and division wherein this court is held, above named.

I.

That said citizenship and residence being [*being*] as above stated the said defendant, for value, executed to the said P. H. & F. M. Roots Company, or order, its negotiable promissory note, dated September 6, 1902, payable thirty days from date, at the Citizens Bank at Prescott, in this state, for the sum of three hundred and seventy-

five dollars, with interest from date until paid at the rate of six per cent per annum; that said note was, by said payee, duly negotiated and transferred in the ordinary course of business to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but payment has been refused by defendant; that said note has been duly protested for non payment, and plaintiff has incurred an expense of three and 40/100 dollars for protest fees. That it hereto attaches a copy of said note, holding the original subject to the order of the court. And it prays judgment etc.

2

II.

The said citizenship and residence being as above stated, the said defendant for value, executed to the said P. H. & F. M. Roots Company, or order, its negotiable promissory note, dated September 6 1902, payable sixty days from date, at the Citizens Bank at Prescott, in this state, for the sum of three hundred and seventy-five dollars, with interest from date until paid at the rate of six per cent per annum; that said note was by said payee duly negotiated and transferred in the ordinary course of business to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but payment has been refused by said defendant; that said note has been duly protested for non payment, and plaintiff has incurred an expense of three and 40/100 dollars for protest fees. That it hereto attaches a copy of said note, holding the original subject to the order of the court. And it prays judgment etc.

III.

The said citizenship and residence being as above stated, the said defendant, for value, executed to the said P. H. & F. M. Roots Company, or order, its negotiable promissory note, dated September 6, 1902, payable ninety days from date, at the Citizens Bank at Prescott, in this state, for the sum of three hundred and seventy-five dollars, with interest from date until paid at the rate of six per cent. per annum; that said note was by said payee duly negotiated and transferred in the ordinary course of business to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but payment has been refused by defendant; that said note has been duly protested for non payment, and plaintiff has incurred an expense of three and 40/100 dollars for protest fees. That it hereto attaches a copy of said note, holding the original subject to the order of the court. And it prays judgment, etc.

IV.

The said citizenship and residence being as above stated, the said defendant, for value, executed to the said P. H. & F. M. Roots Company, or order, its negotiable promissory note, dated September 6, 1902, payable one hundred and twenty days from date, at the Citizens Bank at Prescott, in this State, for the sum of three hundred and

seventy-five dollars, with interest from date until paid at the rate of six per cent per annum; that said note was by said payee duly negotiated and transferred in the ordinary course of business
3 to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but payment has been refused by defendant; that said note has been duly protested for non payment and that plaintiff has incurred an expense of three and 40/100 dollars protest fees. That it hereto attaches a copy of said note, holding the original subject to the order of this court. And it prays judgment, etc.

V.

The said citizenship and residence being as above stated, the said defendant, for value, executed to the said P. H. & F. M. Roots Company, or order, its negotiable promissory note, dated September 6, 1902, payable one hundred and fifty days from date, at the Citizens Bank at Prescott, in this state, for the sum of three hundred and seventy five dollars with interest from date until paid at the rate of six per cent. per annum: that said note was by said payee duly negotiated and transferred in the ordinary course of business to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but payment has been refused by defendant; that said note has been duly protested for non payment, and that plaintiff has incurred an expense of three and 40/100 dollars for protest fees. That it hereto attaches a copy of said note, holding the original subject to the order of the court. And it prays for judgment, etc.

VI.

The said citizenship and residence being as above stated, the said defendant, for value, executed to the said P. H. & F. M. Roots Company, or order, its negotiable promissory note, dated September 6, 1902, payable one hundred and eighty days from date, at the Citizens Bank at Prescott, in this state, for the sum of three hundred and seventy five dollars, with interest from date until paid at the rate of six per cent. per annum; that said note was by said payee duly negotiated and transferred in the ordinary course of business to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but payment has been refused by defendant; that said note has been duly protested for non-payment, and plaintiff has incurred an expense of three and 40/100 dollars for protest fees. That it hereto attached a copy of said note, holding the original subject to the order of the court. And it prays judgment, etc.

4 VII.

The said citizenship and residence being as above stated, the said defendant, for value, executed to the said P. H. & F. M. Roots Company, or order, its negotiable promissory note, dated September 6,

1902, payable two hundred and ten days from date, at the Citizens Bank at Prescott, in this state, for the sum of three hundred and seventy-five dollars, with interest from date until paid at the rate of six per cent. per annum; that said note was by said payee duly negotiated and transferred in the ordinary course of business to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but payment has been refused by defendant; that said note has been duly protested for non payment, and plaintiff has incurred an expense of three and 40/100 dollars for protest fees. That it hereto attaches a copy of said note, holding the original subject to the order of the court. And it prays judgment, etc.

VIII.

The said citizenship and residence being as above stated, the said defendant, for value, executed to the said P. H. & F. M. Roots Company, or order, its negotiable promissory note, dated September 6, 1902, payable two hundred and forty days, from date, at the Citizens Bank at Prescott, in this state, for the sum of three hundred and seventy five dollars, with interest from date until paid at the rate of six per cent. per annum; that said note was by said payee duly negotiated and transferred in the ordinary course of business to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but payment has been refused by defendant; that said note has been duly protested for non-payment and plaintiff has incurred an expense of three and 40/100 dollars for protest fees. That it hereto attaches a copy of said note, holding original subject to the order of the court. And it prays judgment, etc.

IX.

The said citizenship and residence being as above stated, the said defendant for value, executed to said P. H. & F. M. Roots Company, or order, its negotiable promissory note, dated September 6th, 1902, payable two hundred and seventy days from date, at the Citizens Bank at Prescott in this state, for the sum of three hundred and seventy five dollars, with interest from date until paid at the rate of six per cent. per annum, that said note was by said payee duly negotiated and transferred in the ordinary course of business to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but payment has been refused by said defendant; that said note has been duly protested for non-payment, and plaintiff has incurred an expense of three and 40/100 dollars for protest fees. That it hereto attaches a copy of said note, holding the original subject to the order of the court. And it prays judgment, etc.

X.

The said citizenship and residence being as above stated, the said defendant, for value, executed to the said P. H. & F. M. Roots Com-

pany, or [orded], its negotiable promissory note, dated September 2 1902, payable three hundred days after date at the Citizens Bank at Prescott, in this state, for the sum of three hundred and seventy-five dollars, with interest from date until paid at the rate of six per cent per annum; that said note was by said payee duly negotiated and transferred in the ordinary course of business to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but payment has [has] been refused by defendant; that said note has been duly protested for non-payment, and plaintiff has incurred an expense of three and 40/100 dollars for protest fees. That it hereto attaches a copy of said note, holding the original subject to the order of the court. And it prays judgment, etc.

XI.

The said citizenship and residence being as above stated the said defendant, for value, executed to the said P. H. & F. M. Roots Company, or order, its negotiable promissory note, dated September 2 1902, payable three hundred and thirty days from date, at the Citizens Bank, at Prescott, in this state, for the sum of three hundred and seventy five dollars, with interest from date until paid at the rate of six per cent per annum; that said note was by said payee duly negotiated and transferred in the ordinary course of business to plaintiff, before maturity, for value, said plaintiff having so obtained the same in good faith, and it is the owner thereof; that it has duly demanded payment of said note, but has been refused by defendant; that said note has been duly protested for non payment, and plaintiff has incurred an expense of three and 40/100 dollars for protest
6 fees. That it hereto attaches a copy of said note, holding the original subject to the order of the court. And it prays for judgment, etc.

Wherefore it prays judgment for the sum of forty one hundred and twenty five dollars for the principal of said notes, thirty seven and 40/100 protest fees, interest, costs and other proper relief.

MORRIS M. COHN,
Attorney for plaintiff.

Complaint at Law. Filed (before summons issued) Sept. 4, 1903 at 9:45 o'clock a. m. John M. Somervell, Clerk.

PRESCOTT, ARK., *Sept. 6th*, 1902.

Thirty days after date, for value received, we promise to pay to the order of P. H. & F. M. Roots Co. three hundred and seventy five and no/100 dollars at Citizens Bank, Prescott Ark., with interest from date at the rate of six per cent per annum until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

PRESCOTT, ARK., *Sept. 6th*, 1902.

Sixty days after date, for value received, we promise to pay to the order of P. H. & F. M. Roots Co. three hundred and seventy five and no/100 dollars at Citizens Bank, Prescott Ark., with interest from date at the rate of six per cent per annum until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

$375.00 PRESCOTT, ARK., *Sept. 6th*, 1902.

Ninety days after date, for value received, we promise to pay to the order of P. H. & F. M. Roots Co. three hundred and seventy five and no/100 dollars at Citizens Bank, Prescott Ark., with interest from date at the rate of six per cent per annum until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

$375.00 PRESCOTT, ARK., *Sept. 6th*, 1902.

Four months after date, for value received, we promise to pay to the order of P. H. & F. M. Roots Co. Three hundred and seventy five & No/100 dollars at Citizens Bank Prescott Ark., with interest from date at the rate of six per cent per annum until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

7 $375.00. PRESCOTT, ARK., *Sept.* 6, 1902.

Five months after date, for value received, we promise to [—] order of P. H. & F. M. Roots Co. three hundred and seventy five & No/100 dollars at Citizens Bank Prescott Ark., with interest from date at the rate of six per cent. per annum until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

$375.00. PRESCOTT, ARK., *Sept.* 6, 1902.

Six months after date, for value received, we promise to pay to the order of P. H. & F. M. Roots Co. three hundred and seventy five & No/100 dollars at Citizens Bank Prescott Ark., with interest at the rate of six per cent. per annum from date until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

$375.00. PRESCOTT, ARK., *Sept.* 6, 1902.

Seven months after [date*l*] for value received, we promise to pay to the order of P. H. & F. M. Roots Co. three hundred and seventy five & No/100 dollars at Citizens Bank Prescott Ark. with interest at the rate of six per cent. per annum from date until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

$375.00. PRESCOTT, ARK., *Sept.* 6, 1902.

Eight months after date, for value received, we promise to pay to the order of P. H. & F. M. Roots Co. Three hundred and seventy

five & No/100 dollars at Citizens Bank Prescott Ark., with interest from date at the rate of six per cent. per annum until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

$375.00. PRESCOTT, ARK., *Sept.* 6, 1902.

Nine months after date, for value received, we promise to [—] order of P. H. & F. M. Roots Co. three hundred and seventy five & No/100 dollars at Citizens Bank Prescott Ark., with interest from date at the rate of six per cent. per annum until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

8 PRESCOTT, ARK., *Sept.* 6, 1902.

Ten months after date, for value received, we promise to pay to the order of P. H. & F. M. Roots Co. three hundred and seventy five & No/100 dollars at Citizens Bank Prescott Ark., with interest at the rate of six per cent. per annum from date until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

PRESCOTT, ARK., *Sept.* 6, 1902.

Eleven months after date for value received, we promise to pay to the order of P. H. & F. M. Roots Co. three hundred and seventy five & No/100 dollars at Citizens Bank Prescott Ark. with interest at the rate of six per cent. per annum from date until paid.

(Signed) OZAN LUMBER CO.
W. N. BEMIS, *Pt.*

In the United States Circuit Court for the Western District of Arkansas, Texarkana Division.

UNION COUNTY NATIONAL BANK, LIBERTY, INDIANA, Plaintiff,
against
OZAN LUMBER COMPANY, Defendant.

Answer.

Comes the defendant the Ozan Lumber Company, a domestic corporation, and answering the complaint of the plaintiff herein, says:

It admits the [ezecution] of the notes set up in paragraphs One to Eleven of the plaintiffs complaint, but says that said notes were executed for a certain patented Car Loading [Apparatu*d*], Manufactured by the said P. H. & F. M. Roots Company and sold by said company to the defendant herein; that said company being the manufacturer of said Car Loading Apparatus, agreed and contracted with the defendant to furnish them One Standard Decker Log Loader, according to specifications agreed upon, which would ac-

commodate a logging car 52 inches high and of workmanship and material of the best kind, of sufficient strength to load a log of 12,000 pounds, and suitable for loading cars with logs. That said Root Company was the manufacturer of said loader and guaranteed that it would perform the work of loading cars with logs.

9 That said loader would not accommodate a car 52 inches in height, was constructed of poor material, was easily broken and could not be kept in repair, and was worthless [fot] the purposes for which defendant purchased the same.

Wherefore, defendant says there was no consideration for the said notes, It denies that said notes were by the said Payees duly negotiated and transferred in the ordinary course of business to plaintiff before maturity for value, and denies that plaintiff obtained the same in good faith.

II.

Further answering defendant says:

That said notes were given for a patented article, covered by letters patent, No. 621043, granted March 14th 1899 and by letters patent No. 654954 granted July 31 1900 to Georga W. Decker, copies of which letters patent and of the specifications and drawings of said patents, authenticated by the seal and certified by the Commissioner of Patents, defendant holds subject to inspection by the plaintiff, and subject to the orders of the court; and that said notes were given for said machine patented as aforesaid, and were not executed upon a printed form which showed upon its face that said notes were executed in consideration of a patented machine, implement, substance or instrument as required by section 493 of Sandel's & Hill's Digest of the Statutes of Arkansas, and that the plaintiffs herein have taken said notes well knowing the same to be executed for such patented article, and therefore defendant denies that the plaintiff is an innocent holder and says that said notes are absolutely null and void.

Wherefore defendant prays judgment.

McRAE & TOMPKINS,
Attorneys for Defendant.

STATE OF ARKANSAS, *County of Nevada.* ss:

W. N. Bemis, being sworn, says that he is the President of the Ozan Lumber Company and that the facts set forth in the foregoing answer are true as he verily believes.

W. N. BEMIS.

Sworn to and subscribed before me this the 11th day of November 1903.

____ ____,
Notary Public.

Answer. Filed Nov. 12, 1903. John M. Somervell, Clerk.

10 In the United States Circuit Court for the Western District of Arkansas, Texarkana Division.

UNION COUNTY NATIONAL BANK OF LIBERTY, IND.,
v.
OZAN LUMBER COMPANY, Defendant.

Demurrer.

The plaintiff demurs to the second paragraph of the answer because it does not set forth facts sufficient to constitute a defense herein.

MORRIS M. COHN,
Attorney for Pl'ff.

Filed Nov. 12, 1903.

JOHN M. SOMERVELL, *Clerk.*

In the Circuit Court of the United States for the Western District of Arkansas, Texarkana Division.

UNION COUNTY NATIONAL BANK.
vs.
OZAN LUMBER COMPANY.

Amendment to First Paragraph of Answer.

And for amendment to the first paragraph of answer the defendant says "that the said notes sued on were and are void and not binding upon it, because the payees T. H. & F. M. Roots Company was a foreign corporation doing business in the state of Arkansas, and had not filed with the Secretary of State a certificate designating a citizen of this State as its agent upon whom service of summons and other process could be made, and its principal place of business as required by the laws of said state of Arkansas.

McRAE & TOMPKINS, &
C. C. HAMBY,
Attorneys for Defendant.

Filed Nov. 15th, 1904.

JOHN M. SOMERVELL, *Clerk.*

In the Circuit Court of the United States for the Western District of Arkansas, Texarkana Division.

UNION COUNTY [*BATIONAL*] BANK
v.
OZAN LUMBER COMPANY.

Motion to Strike Out Amendment to First Paragraph of Answer.

The plaintiff moves to strike the amendment to the first paragraph of the answer from the files, because this cause is set down for trial

on this day, and will soon be reached, and because the matter
11 set forth in said amendment is not germane to the matter set out in the first paragraph of the answer, and if a fact, which it denies, was and could have been known long ago to the defendant; and because it sets up immaterial matter.

MORRIS M. COHN,
Attorney for Plaintiff.

Filed Nov. 15th, 1904.

JOHN M. SOMERVELL, *Clerk.*

United States Circuit Court, Texarkana Division, Western District of Arkansas.

On Nov. 12th, 1903, the same being a regular day of this court the following was had:

No. 239.

UNION COUNTY BANK OF LIBERTY, INDIANA,
vs.
OZAN LUMBER COMPANY.

On this day comes the defendant and files [ita] answer to plaintiff's complaint. And now comes plaintiff and files its demurrer to the second paragraph of defendant's answer, and by consent this cause is to be submitted on briefs and the plaintiff is granted 30 days to file its brief and the defendant 30 days thereafter to file its brief and this cause is continued.

And on March 8th, 1904, the same being a regular day of this court the following was had:

No. 239.

UNION COUNTY BANK OF LIBERTY, INDIANA,
vs.
OZAN LUMBER COMPANY.

On this day the demurrer to the second paragraph of defendant's answer filed herein coming on to be heard, come the parties in open court by their respective counsel, and the court being well and sufficiently advised in the premises hands down and has filed its opinion herein sustaining said demurrer. It is therefore considered, ordered and adjudged by the court that said demurrer be and the same is hereby sustained.

To which ruling of the court, in sustaining said demurrer, the defendant excepts and asks that its exceptions be noted of record; which is done. And it is further ordered by the court that defendant have 30 days from this date in which to file its amended answer, and it is further ordered that the clerk of this court furnish plaintiff and defendant, each, with a certified copy of this order.

And on May 10th, 1904, the same being a regular day of this cou[rt] the following was had:

12 No. 239.

UNION COUNTY BANK OF LIBERTY, INDIANA,
vs.
OZAN LUMBER COMPANY.

On this day, by consent it was ordered by the court that this ca[use] be continued till the next term of the Court.

UNION COUNTY BANK OF LIBERTY, INDIANA,
vs.
OZAN LUMBER COMPANY.

Now on this 16th day of November 1904 come the parties by th[eir] attorneys, and the motion to strike the amendment to the first pa[ra-] graph of the answer having been submitted to the court, and [the] court having heard the argument of counsel and being sufficien[tly] advised in the premises, it is considered, ordered and adjudged t[hat] the said motion be and the same is hereby sustained and said amen[d-] ment is hereby stricken from the files of the court in this cause. To which ruling of the court the defendant hereby excepts.

And on Nov. 15, 1904, the same being a [regular] day of t[his] court, the following was had:

No. 239.

UNION COUNTY BANK OF LIBERTY, INDIANA,
vs.
OZAN LUMBER COMPANY.

On this day comes the plaintiff, by its attorney M. M. Cohn, [and] files herein its objections to the amendment to the answer filed here[in.]

And on Nov. 16, 1904, a regular day of [this] court, the follow[ing] was had:

No. 239.

UNION COUNTY BANK OF LIBERTY, INDIANA,
vs.
OZAN LUMBER COMPANY.

On this 16th day of November A. D. 1904, this cause comes [on] for trial, and come the parties by their attorneys and both s[ides] having announced themselves ready for trial comes a jury compo[sed] of twelve good and lawful men, as follows: W. L. Williamson, Gr[een] Cheatham, E. C. Allen, Henry Platz, A. L. Helms, Wm. F. Gilb[ert,] W. W. Boyd, J. M. Thompson, C. A. Love, Isaac White, W. E. La[ncey,]

and F. E. Whitehead, who were selected to try the issues in this cause, and who duly sworn and empanelled to well and truly try the issues joined and inquire of the damages in this cause and a true verdict render according to the law and the evidence. And
13 having heard the evidence and the instructions of the court, returned into court the following verdict to-wit:

"We the jury, find the issues for the plaintiff and assess its damages at $4698.65.

W. W. BOYD, *Foreman.*"

It is therefore considered, ordered and adjudged that the plaintiff, Union National Bank of Liberty Ind., recover of and from the defendant, Ozan Lumber Company, the sum of Forty six hundred and ninety eight & 65/100 dollars for its debt and damages together with interest thereon from the date of this judgment at the rate of six per cent per annum, and its costs herein, and that it have execution therefor. To which verdict and judgment the Defendant excepted. And the Defendant having prayed time in which to file its Bill of Exceptions herein, the period of Sixty days is allowed it in which to file said Bill of Exceptions. And it is ordered that no execution do issue upon said judgment, until after the expiration of said sixty days.

Circuit Court of the United States. Western District of Arkansas. Texarkana Division.

UNION COUNTY NATIONAL BANK OF LIBERTY INDIANA, Plaintiff,
v.
OZAN LUMBER [COMPANY], Defendant.

Morris M. Cohn for Plaintiff.
McRae & Tompkins and C. C. Hamby for defendant.

Opinion.

ROGERS, *District Judge:*

Plaintiff, the assignee of certain promissory notes, drawn in the usual form, sued the defendant, who is the maker of the notes. The defendant answered in two counts. Plaintiff interposed a general demurrer to the second count, which is as follows: "That said notes were given for a patented article, covered by letters patent No. 621043, granted March 14th 1899, and by letters patent No. 654954, granted July 31st 1900, to George W. Decker, copies of which letters patent and of the specifications and drawings of said patents, authenticated by the seal and certificate of the Commissioner of Patents defendant holds subject to the inspection of the plaintiff and subject to the orders of the court; that said notes were given for said Machine patented as aforesaid, and were not executed upon a printed form which showed upon its face that said notes were executed in consideration of a patented machine, implement, substance or instrument as required by section 493 of Sandel's & Hill's Digest of the

Statutes of Arkansas, and that the plaintiffs herein have taken
14 said notes well knowing the same to be executed for such patented article, and therefore defendant denies that the plaintiff is an innocent holder and says that said notes are absolutely null and void."

This count is based on the Act of the Legislature of the State of Arkansas, approved April 23rd 1891, (S. & H. Digest, sections 493-496, inclusive). The Act is as follows:

SECTION 1. That hereafter any vendor of any patented machine, implement, substance or instrument of any kind or character, whatever, when the said vendor *if* the same effects the sale of the same to any citizens of this state on a credit, and takes any character of negotiable instrument, in payment of the same, the said negotiable instrument shall be executed upon a printed form, and show upon its face, that it was executed in consideration of a patented machine, implement, substance or instrument, as the same may be, and no person shall be an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they [—] given shall be absolutely void.

SECTION 2. That the foregoing section shall also apply to vendors of patent rights, and family rights to use any patented thing of any character whatever.

SECTION 3. That any vendor of any patented thing of any character, or any vendor of any patented right or family right to use any patented thing of any character whatever, who shall violate the provisions of Section One of this act, shall upon conviction be punished by a fine of not more than three hundred dollars.

SECTION 4. This act shall not apply to merchants and dealers who sell patented things in the usual course of business.

SECTION 5. That this act shall take effect from and after its passage.

Approved April 23rd 1891.

(Session Acts 1891 page 296).

If this act is constitutional, the demurred must be overruled, if unconstitutional it must be sustained.

In Wyatt *v.* Wallace, 67 Ark., 575, the Supreme Court of Arkansas had under consideration the construction to be placed upon this act in so far as it applied to the sale of "patent right territory in the state of Arkansas" and the act was upheld. In that case the note sued
15 on was given for a one third interest in a "patent right Territory." The court, speaking through Mr. Justice Hughes, simply set out the statute at length, as I have, *supra,* and then adds "This act is plain and emphatic: The note sued on in this case was void for non-compliance with section 493 of the statute quoted above. The note could not be the basis of recovery in this suit. And as evidence of indebtedness, it was void under section 493."

Manifestly, if this statute is good in a case where the consideration is an interest in a "patent right Territory," certainly it is good where,

as in this case, the consideration is for a machine protected by a patent. The cases make a wide distinction on that point. See notes to

Commonwealth of Ky. *v.* Petty 29 L. R. A., 786, *et seq.*
Patterson *v.* Kentucky, 97, U. S.; 501.
1st National Bank of Chattanooga *v.* Stockwell, 20, L. R. A. 605 and notes.
Mason *v.* McLeod, 41 L. R. A. 548 and notes.
Castle *v.* Hutchinson, 25 Fed. 394.
Reeves *v.* Corning, 51 Fed. 774.

At Page 506 of Patterson *v.* Kentucky, *supra,* the distinction referred to above is clearly recognized. I need not stop to multiply, review or distinguish the cases on that point. If the only question involved was the constitutionality of the first section of the act of April 23rd, 1891, I should feel inclined to uphold the statute in this case, where the consideration of the note is for a patented machine and not for an interest in a [pa*y*ent] right or patent right territory, see * * * the cases cited *supra.* But the third section of the act makes it a criminal offense to violate the first section, and the fourth section of the act excepts from the provisions of the act "merchants and dealers who sell *patented things* in the usual course of business." Section 1 of Article XIV of the Constitution of the United States provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It will be observed that the provisions of Section 4 of the act which excepts from the operation of the act "merchants and dealers who sell patented things in the usual course of business" does not except from the operation of the act merchants and dealers who sell *patent rights or patent right territory.* In other words, the exception is limited to *patented things* sold by merchants and dealers in the usual course of business: so that it may be that the case at bar is distinguished from the case of
16 Wyatt *v.* Wallace, *supra.* It is, how-ver, not necessary in this case to express any opinion as to the correctness of the decision in that case, or to [criticize] or distinguish it from the case at bar. Any opinion in reference to the questions involved in that case is distinctly reserved until the necessity arises for their consideration.

By the plain provisions of this act it is made to apply to all persons except "merchants and dealers who sell patented things in the usual course of business." How shall this act be recognized with the last paragraph of the 1st section of the XIV Article of the Constitution of the United States, which forbids, in terms, any state to "deny to any person within its jurisdiction the equal protection of the laws." How can the state, acting within this provision of the Constitution, protect by its laws "merchants and dealers who sell patented things in the usual course of business" and deny the same protection to other persons, as, for instance manufacturers of the same patented things who "sell them in the usual course of business."

If a merchant or dealer has sold the article in the usual course of business for which the notes in question were given, and having sued on them, could recover, notwithstanding the statute in question, must not the same right to recover be accorded all other persons, under like [circumstances]? If the statute in question is a perfect defense for this defendant, must it not also be a perfect defense in all similar cases, without reference to who the plaintiff may be, or what his business may be? If any citizen of this state has a right to set up a certain statutory defense, must not all other citizens, without reference to their occupation, whether of this or any other state, have the same right? The decision of this case involves the answer to these questions. The principle is not a new one; it has arisen in many cases; and sometimes they leave the line between the police powers of the state and the powers of the United States, as found in their constitution, but dimly drawn, and even in apparent conflict. Nevertheless each case must be met, having due regard for the rights, duties and powers of both Governments.

In Gulf, Colorado & Santa Fe Ry. *v.* Ellis 165 U. S. 150, the state of Texas had enacted a statute providing "that any person in this state having a valid *bona fide* claim for personal services rendered, or labor done, or for damages, or for overcharges on freight, or claim for stock killed or injured, by the train of any railway company, provided that such claim for stock killed or injured shall be presented to
the agent of the company nearest to the point where such
17 stock was killed or injured, against any railway corporation operating a railroad in this state, and the amount of such claim does not exceed $50.00, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and, if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all the costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10.00 to be assessed and awarded by the court or jury trying the issue * * *."

In that case it was held that the statute operated "to deprive the railroad companies of property without due process of law in that it singles them out of all citizens and corporations, and requires them to pay in certain cases, attorneys fees to the parties successfully suing them, while it gives to them no like or corresponding benefit." Mr. Justice Brewer, delivering the opinion of the Court in the case, collates a large number of cases from various states, including Arkansas, to illustrate the conclusions reached by the court. He distinctly admits that it is not [within] the scope of the XIV Amendment to withhold from states the power of classification, but affirms that the classification must be based "upon some difference which bears a reasonable and just relation to the act in respect to which the classifi-

cation is proposed, and can never be made arbitrarily and without any such basis." What can be more arbitrary than to say that merchants shall be exempt from the provisions of the first three sections of the act, but it shall be in force and effect as to all other persons? To illustrate, a merchant may sell to A-B, for the use of his wife, a sewing machine, in the usual and ordinary course of business, and the act does not apply to him. But A-B, on the following day, loses his wife, has no use for the machine and sells it to C-D, and the act applies with full force as to him, and the note he takes for it is void in his hands and those of all other persons if it does not conform to the act, and he is subject to indictment. Can any sort of logic or reasoning, however ingenious, justify such an arbitrary act of legislation as that? In the careful examination of a wide range of cases, construing the legislation of the different
18 states relating to class legislation (of which, in recent years, there has been no dearth, indeed, a superabundance) no statute has been found more arbitrarily or flagrantly at variance with equality than this. It is, however, not without precedent, Connolly *v.* Union Sewer Pipe Company 184 U. S. 540, was a case of this nature. Connolly bought of the Union Sewer Pipe Company a lot of sewer pipe, for which he executed his notes. He did not pay the notes when they matured and the company sued him. Connolly interposed several defenses. Among others, he alleged that the company was, when the pipe was sold and afterwards, a member of a trust, illegal, among other reasons, because it was organized and operating in violation of an Illinois statute relating to trusts and other illegal combinations in trade, which, by express provision, made the notes sued on void, both at law and in equity. This act of the state of Illinois will be found set out at length on pages 552, 553, 554 and 555 of No. 184 U. S. Reps. The eighth and ninth sections of the act are as follows:

"SECTION 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void, and not enforceable either in law or equity.

SECTION 9. The provisions of this act *shall not apply to agricultural products or live stock while in the hands of the producer or raiser.*"

Mr. Justice Harlan, in delivering the opinion of the court in that case said "That the arrangement or combination made between the Union Sewer Pipe Company and other companies, corporations and firms, created such a trust as the Illinois Statute forbids is manifest from the evidences in the record. It is equally clear that if the plaintiff was an Illinois corporation, its charter could be forfeited and an end put to its corporate existence by proceedings instituted by the Attorney-General of the state. Sections 1, 2 and 3. It is also clear that if the statute is not altogether invalid, the defendants could plead non-liability for the pipe purchased by them upon the ground that the plaintiff was, under the statute of Illinois, an illegal combination, and the contracts which it made with the defendants were void. Sections 8, 10. The statute expressly authorizes such a defense." Further on he says: "The question of constitutional law, to which

we have referred, cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained.

19 But as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even*ly* when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived." The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." The state has undoubtedly the power by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends, amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. Gibbons *v.* Ogden, 9 Wheat, 1, 210; Sinnot *v.* Davenport, 22 How. 227, 243; Missouri, Kansas & Texas Railway *v.* Haber, 169 U. S. 613, 626.

What may be regarded as a denial of the equal protection of the law is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights, protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guarantee of the equal protection of the law means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumtances". Missouri *v.* Lewis, 101 U. S. 22, 31.

We have also said: "The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil right; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that

20 no greater burden should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed

to all for like offenses." Barbier *v.* Connolly, 113 U. S. 27, 31. This language was cited with approval in Yick Wo *v.* Hopkins, 118 U. S. 356, 369, in which it was also said that "the equal protection of the laws is a pledge of the protection of equal laws." In Hayes *v.* Missouri, 120 U. S. 68, 71, we said that the fourteenth amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate "shall be treated alike, under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed." "Due process of law and the equal protection of the laws, this court has said, are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government". Duncan *v.* Missouri, 152 U. S. 377, 382. Many other cases in this court are to like effect.

These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute that all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are excepted from the operation of the statute, and may combine to do that which, if done by others, would be a crime against the state. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a state, and agriculturalists and raisers of live stock, are all in the same general class, that is they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations applicable to all in like [consitions], as the state may legally prescribe.

The difficulty is not met by saying that, generally speaking, the state, when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to preserve public objects. For this court has held that classifications "must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, and can never be made arbitrarily and without any such basis * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those con-
21 stitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reason of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and not a mere arbitrary selection." Gulf, Colorado & Santa Fe Railway *v.* Ellis, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in Cotting *v.* Kansas City Stock Yards Co. 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating

the charges of a particular stock yards company in the state, but which exempted certain stockyards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws." The principles decided in that case condemn the statute of Arkansas under consideration, as in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

It may not be out of place to observe, in this connection that this case demonstrates that in all anti-trust legislation enacted by the states, the law must be made to apply to all classes of persons and corporations alike, otherwise it becomes invalid, because in violation of the Fourteenth Amendment to the Constitution of the United States.

A single question remains: can the fourth section of the act be eliminated, leaving the rest of the act in operation? That question is answered by Connelly *v.* Union Sewer Pipe Co., *Supra*, Mr. Justice Harlan says "The principles applicable to such a question are well settled by the adjudication of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms all persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the 9th section declares that the statute shall not apply to agriculturalists, or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legis-
22 lature intended that they should not [—] regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products, or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the 9th section."

This language is just as applicable to the case at bar as it was to the case then under consideration. The whole act is unconstitutional in so far as it applies to the sale of patented things. The demurrer to the second paragraph of the answer is sustained.

JNO. H. ROGERS, *Judge.*

Fort Smith, Ark., Jan. 2nd, 1904.

Filed March 8, 1904.

JOHN M. SOMERVELL, *Clerk.*

To the Honorable John H. Rogers, Judge of the United States Circuit Court for the Western District of Arkansas, Texarkana Division:

Your petitioner, the Ozan Lumber Company, a corporation, would respectfully show, that in a cause pending in said court wherein the Union County National Bank of Liberty, Indiana, was plaintiff and your petitioner was defendant, a judgment was rendered in favor of said plaintiff and against said defendant for the sum of $4698.65 at its November Term 1904, and that, being desirous of taking said cause, by writ of error, to the United States Circuit Court of Appeals for the Eighth Judicial Circuit for the correction of alleged errors: he prays that a writ of error may be granted in said cause in due form of law.

Petitioner also presents here a bond duly executed by its officers in its name and with good and sufficient sureties according to the statute in such case made and provided, which it prays may be approved; and that supersedeas may issue thereon accordingly.

And for error complained of petitioner presents the following:

Assignment of Errors.

1. The said Circuit Court erred in sustaining the demurrer to the 2nd paragraph of defendant's answer.

23 2. Said Circuit Court erred in sustaining the motion to strike from the file, the amendment to the 1st paragraph of defendant's answer.

And your petitioners will ever pray, etc.

McRAE & TOMPKINS,
C. C. HAMBY,
ROSE, HEMINGWAY & ROSE,
For Petitioner.

Bond approved and writ of error allowed this January 11th 1905.

JOHN H. ROGERS,
Judge U. S. Circuit Court for the Western District of Arkansas, Texarkana Division.

Prayer for Appeal and Assignment of Errors.

Filed January 13th, 1905, at 9 o'clock A. M. John M. Somervell, Clerk.

Know All Men By These Presents: That we, the Ozan Lumber Company, a corporation, as principal, and William N. Bemis, Horace E. Bemis, James T. Brooks and William G. Stainton, are held and firmly bound unto the Union County National Bank of Liberty, Indiana, a corporation, in the full and just sum of Six Thousand Dollars, to be paid, to the said Union County National Bank of Liberty, Indiana, or assigns; to which payment, well and truly to

be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 9th day of January in the year of our Lord, One thousand Nine Hundred and Five.

Whereas, lately, at the November Term A. D. 1904 of the Circuit Court of the United States for the Texarkana Division of the Western District of Arkansas, in a suit depending in said court, between said Union County National Bank of Liberty Indiana, plaintiff, and said Ozan Lumber Company, defendant, judgment was rendered against the said defendant for the sum of about $4698.65 and costs of suit, and the said Ozan Lumber Company has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit and a citation directed to the said Union County National Bank, of Liberty, Indiana, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from the date of said Citation.

The Condition of the above obligation is such that if the said Ozan Lumber Company shall prosecute said writ to effect, and an-
24 swer all damages and cost, if it fails to make good its said plea, then the above obligation to be void otherwise to remain in full force and effect.

[Seal of Ozan Lumber Co.]

OZAN LUMBER CO., [SEAL.]
By W. N. BEMIS, *President.*
WILLIAM N. BEMIS, [SEAL.]
H. E. BEMIS, [SEAL.]
THOMAS C. McRAE, JR., [SEAL.]
JAMES T. BROOKS, [SEAL.]
WILLIAM G. STAINTON. [SEAL.]

Approved by
JOHN H. ROGERS,
District Judge.

Supersedeas Bond.

Filed January 13th, 1905 at 9 o'clock A. M. John M. Somervell, Clerk.

The United States of America to Union County National Bank of Liberty, Indiana, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Texarkana Division of the Western District of Arkansas, wherein the Ozan Lumber Co. is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should

not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Rogers Judge of the Circuit Court of the United States for the Western District of Arkansas, this 13 day of January in the year of our Lord one thousand nine hundred and five.

JOHN H. ROGERS,
United States District Judge, for the Western District of Arkansas.

I acknowledge service of the within writ. January 16, 1905.
MORRIS M. COHN,
Attorney of Record in the Court Below.

No. 239. United States Circuit Court, Texarkana Division of the Western District of Arkansas. Union National Bank of Liberty, Indiana, *vs.* Ozan Lumber Co. Citation. Filed 13th day of January 1905 at 9 o'clock a. m. John M. Somervell, Clerk.

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Southern Division of the Western District of Arkansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the November Term, 1904, thereof, between the Union County National Bank of Liberty, Indiana, and the Ozan Lumber Company a manifest error hath happened, to the great damage of the said Ozan Lumber Co. as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the — day of —— 189-, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13 day of January in the year of our Lord one thousand nine hundred and five.

Issued at office in the City of Texarkana, with the seal of the

Circuit Court of the United States for the Texarkana Division of the Western District of Arkansas, dated as aforesaid.

[The Seal of the Circuit Court. West. Dist. Ark., Texarkana Division. U. S. A.]

JOHN M. SOMERVELL,
Clerk Circuit Court United States, Western Division of the Western District of Arkansas.

Allowed by
JOHN H. ROGERS, *Judge.*

26 I certify that this is a true copy of the writ of error in the above entitled cause remaining of record in my office. This January — 1905.

[The Seal of the Circuit Court. West. Dist. Ark., Texarkana Division. U. S. A.]

——— ———,
Clerk U. S. Ct. Ct. W. Div. Ark., Texarkana Division.

Return to Writ.

UNITED STATES OF AMERICA,
Texarkana Division of the Western District of Arkansas, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Texarkana, this 31st day of January A. D. 1905.

[The Seal of the Circuit Court. West. Dist. Ark., Texarkana Division. U. S. A.]

JOHN M. SOMERVELL,
Clerk of said Court.

I acknowledge service of this writ January 16, 1905.

MORRIS M. COHN,
Attorney of Record in the Court Below.

No. 239. United States Circuit Court. Texarkana Division of the Western District of Arkansas. Union National Bank of Liberty, Indiana *vs.* Ozan Lumber Co. Writ of Error to the Circuit Court of the United States for the Texarkana Division of the Western District of Arkansas. Filed 13th day of January 1905 at 9 o'clock a. m. John M. Somervell, Clerk.

Certificate.

I John M. Somervell, clerk of the United States Circuit Court for the Texarkana Division of the Western District of Arkansas, do hereby certify that the foregoing thirty pages contain a full and correct copy of the Complaint, Answer, Demurrer, Amendment to answer, Motion to strike same, Orders of the Court the Opin-
27 ion of the Court, Prayer for Appeal, Supersedeas Bond and the Original Citation and Writ of Error in the case wherein the Union County National Bank of Indiana is plaintiff and the Ozan Lumber Company is defendant as the same appears of record in my office.

In Testimony Whereof I have hereunto set my hand as said Clerk and affixed the seal of said Court at my office in Texarkana Arkansas, this 31st day of January A. D. 1905.

[The Seal of the Circuit Court. West. Dist. Ark., Texarkana Division. U. S. A.]

JOHN M. SOMERVELL.

Fee $12.50. Paid by Ozan Lumber Co. John M. Somervell Clerk.

Filed Feb. 7, 1905.
JOHN D. JORDAN, *Clerk.*

28 *(Clerk's Certificate to Printed Record.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing printed record of twenty-seven pages in the case of Ozan Lumber Company, Plaintiff in Error, *v.* Union County National Bank of Liberty, Indiana, No. 2205, was printed under my supervision and is identical with the printed record upon which said cause was heard and decided in the Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-fifth day of April, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

29 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1905, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December,

able
to wit: the fourth day of December, A. D. 1905, before the Honora cuit
Willis Van Devanter and the Honorable William C. Hook, Circ
Judges, and the Honorable William Lochren, District Judge. it.]

[Seal United States Circuit Court of Appeals, Eighth Circui

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court it.
of Appeals for the Eighth Circui

ıy of
Be it Remembered that heretofore, to-wit: on the seventh da it of
February, A. D. 1905, a transcript of record pursuant to a wri Vest-
error directed to the Circuit Court of the United States for the W the
ern District of Arkansas, was filed in the office of the clerk of it, in
United States Circuit Court of Appeals for the Eighth Circuit iff in
a certain cause wherein the Ozan Lumber Company was Plaintiliana,
Error and the Union County National Bank of Liberty, Indi filed
was Defendant in Error, which said transcript of record was
and docketed in said Circuit Court of Appeals as No. 2205 cause,
That thereafter the following proceedings were had in said ca
in said Circuit Court of Appeals, viz:

30 *(Appearance of Counsel for Defendant in Error.)*

ıce of
On the seventh day of February, A. D. 1905, the appearan words
counsel for defendant in error was filed in said cause, in the v
and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2205.

OZAN LUMBER COMPANY, Plaintiff in Error,
vs.
UNION COUNTY NATIONAL BANK OF LIBERTY, IND., Defend dant
in Error,

endant
The Clerk will enter my appearance as Counsel for the Defe
in Error. HN.

MORRIS M. COI

t. No.
(Endorsed:) U. S. Circuit Court of Appeals, Eighth CircuitCounty
2205. Ozan Lumber Company, Plaintiff in Error, *vs.* Union C, 1905,
National Bank of Liberty, Ind. Appearance. Filed Feb. 7, dant in
John D. Jordan, Clerk. Morris M. Cohn, Counsel for Defend
Error.

(Appearance of Counsel for Plaintiff in Error.)

rance of
And on the ninth day of February, A. D. 1905, the appeara rds and
counsel for plaintiff in error was filed in said cause, in the wor
figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2205.

OZAN LUMBER COMPANY, Plaintiff in Error,
vs.
UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

U. M. ROSE.

31 (Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2205. Ozan Lumber Company, Pl'ff in Error, *vs.* Union County National Bank of Liberty, Indiana. Appearance. Filed Feb. 9, 1905, John D. Jordan, Clerk. U. M. Rose, Counsel for Pl'ff in Error.

(Order of Submission.)

And on the twenty-fourth day of May, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1905.

WEDNESDAY, *May* 24, 1905.

No. 2205.

OZAN LUMBER COMPANY, Plaintiff in Error,
vs.
UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

This cause having been called for hearing in its regular order, and counsel not appearing to argue orally, this cause was thereupon taken by the Court as submitted on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the fourth day of April, A. D. 1906, an opinion of said Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

32 United States Circuit Court of Appeals, Eighth Circuit.

No. 2205, December Term, A. D. 1905.

OZAN LUMBER COMPANY, Plaintiff in Error,
vs.
UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Mr. T. C. McRae, Mr. W. V. Tompkins and Mr. U. M. Rose filed a brief for the plaintiff in error.
Mr. Morris M. Cohn filed a brief for the defendant in error.

Before Van Devanter and Hook, Circuit Judges, and Lochren, District Judge.

The Lumber Company, in the purchase from a manufacturer of a machine for loading logs upon cars gave eleven promissory notes negotiable in form. The Bank acquired the notes in the regular course of business for value and before maturity, and upon default in payment brought action against the Lumber Company. The latter asserted by way of defense that the machine was covered by letters patent of the United States, that the notes were not executed upon a printed form showing that the consideration was a patented machine or implement as required by an Arkansas statute and that under the statute the Bank was not an innocent purchaser and the notes were absolutely null and void. The Arkansas statute referred to (secs. 493-496 Sandels and Hill's Digest) provides that every negotiable instrument taken in payment for any patented machine, implement, substance or instrument shall be executed on a printed form showing upon its face that it was so taken, no person shall be considered an innocent purchaser thereof though he may have given value for the same before maturity, the maker may interpose defense to the collection of the same in the hands of any holder, and finally that all such negotiable instruments not showing on their face for what they were given shall be absolutely void. A violation of the statute is punishable by a fine.

A demurrer to this defense was sustained and the Bank had judgment.

33 HOOK, *Circuit Judge,* after stating the case as above, delivered the opinion of the court:

The question presented is that of the validity of the Arkansas statute which, as applied to this case, declares that the notes are non-negotiable and are null and void in the hands of an innocent purchaser because they were not executed upon printed forms showing on their face that they were given in payment of a patented machine. It will be noticed that the statute strikes directly at the protection afforded by a patent issued by the national government, and that it does not proceed upon any consideration of the character of the machine itself or the use for which it is designed. If the manufacture and sale of the machine were not protected by letters patent the statute would not be applicable nor would it apply if a patent once issued had expired by limitation. In other words, were it not for the patent the case would not be within the statute. If the notes had been given for a car-loading machine precisely like the one in question but upon which no patent had been obtained they would then be valid obligations free from all equities in the hands of an innocent purchaser. These observations narrow the inquiry, and the question is whether a state may so discriminate by hostile legislation against rights granted by the United States pursuant to the provisions of the Constitution.

This legislation has been upheld by the Supreme Court of Arkansas (Tilson *v.* Gatling, 60 Ark. 114; Wyatt *v.* Wallace, 67 Ark. 575; Roth *v.* Bank, 70 Ark. 200). And it is claimed that authority for it may also be found in Patterson *v.* Kentucky, 97 U. S. 501 and Webber *v.* Virginia, 103 U. S. 344. There is a wide-spread misconception of the doctrine of these two cases and it has been freely employed in support of conclusions which in our opinion are radically different from those announced by the Supreme Court. In the Patterson case a Kentucky statute enacted in the rightful exercise of the police powers of the state, provided for the inspection and gauging of illuminating oils and fluids, recognized as standard those that ignited and permanently burned at a specified temperature, and condemned as unsafe for illuminating purposes those that more quickly yielded to combustion. It was sought to exempt from the operation of this statute a certain patented oil which could not be made to comply with the test, and the exemption claimed rested solely upon the ground that the oil was protected by letters patent. The right was asserted to sell the patented oil in any part of the United States without regard to local statutes or regulations. It will be observed that there was no discrimination whatever against any right or privilege granted by and enjoyed under the Constitution and laws of the United States. On the other hand there was an assertion by Patterson of a special immunity and exemption of the patented oil from local laws properly enacted with reference to all property of the class described whether possessing patented features or not. It was held by the Supreme Court that there was no such exemption from the operation of the police laws of the state.

In the Webber case there was an attempt by an agent of a man-

ufacturing company to escape the operation of the tax and
34 license laws of Virginia upon the ground that the machines sold by him were covered by a patent. The laws in question had a general application and did not relate exclusively to those who sold patented articles. It was held that the right conferred by the patent laws upon inventors to sell their inventions and discoveries did not remove the tangible property to which the invention or discovery was applied from the operation of the local laws.

Similar questions were presented in Jordan *v.* Overseers, 4 Ohio 295, and Vanini *v.* Paine, 1 Harr. (Del.) 65. In the first of these cases the assignee of a patent for making, using and vending a certain medicine contended for the invalidity of an Ohio statute regulating the practice of physic and surgery, and in the second it was claimed that a statute prohibiting lotteries did not operate against a patented mode of conducting such prohibited business.

Some courts have upheld local statutes requiring that notes taken in the sale of patent rights as distinguished from the corporeal articles in which the invention or discovery is exhibited shall recite such facts upon their face under penalty of invalidity of the notes or the imposition of a fine (Tod *v.* Wick, 36 Ohio St. 370; Mason *v.* McLeod, 57 Kans. 105; New *v.* Walker, 108 Ind. 365; Herdic *v.* Roessler, 109 N. Y. 127; Hankey *v.* Downey, 116 Ind. 118; Sandage *v.* Mfg. Co., 142 Ind. 148; Haskell *v.* Jones, 86 Pa. St. 173; Pinney *v.* Bank, 68 Kan. 223), and in some of the cases Patterson *v.* Kentucky is cited in support of the conclusions reached.

Other courts have denied the validity of such statutes (Pegram *v.* Alkali Co., 122 Fed. 1000; Reeves *v.* Corning, 51 Fed. 774, 787; Castle *v.* Hutchinson, 25 Fed. 394; Helm *v.* Bank, 43 Ind. 167; Cranson *v.* Smith, 37 Mich. 310; Crittenden *v.* White, 23 Minn. 24; Woollen *v.* Banker, 2 Flip. 33, 30 Fed. Cas. No. 18030, opinion by Justice Swayne at the circuit; State *v.* Lockwood, 43 Wis. 403; Wilch *v.* Phelps, 14 Neb. 134; Holliday *v.* Hunt, 70 Ill. 109; *Ex-parte* Robinson, 2 Biss. 309, 20 Fed. Cas. No. 11932, opinion by Justice Davis at the circuit) and some of them have distinguished Patterson *v.* Kentucky by directing attention to the fact that it related to the tangible product of an invention which had become a part of the general mass of property within the state while the statutes under consideration were levelled exclusively against the incorporeal patent rights granted by the United States.

The doctrine of the Patterson and Webber cases is clear and well defined. It is that the tangible products of an invention become a part of the mass of property of the state and fall within the domain of its police power and that immunity from the lawful exercise of that power can not be claimed solely because of the incident of the patent. But it is an entirely different thing to say that merely because articles are patented they may for that reason be selected from the mass of other property of like character for invidious and hostile discrimination. If the Kentucky statute had been directed against certain oils solely because they were compounded under a patent formula and had excluded from its operation unpatented oils of like character that would ignite and burn

at the same temperature a different question would have been presented from that determined by the Supreme Court; and in the Webber case if the Virginia statute had required those who sold sewing machines protected by a patent to obtain a license and pay a tax when such burdens were not imposed upon the vendors of unpatented machines a different conclusion would, in our opinion, have followed. (State *v.* Butler, 71 Tenn. 222; *In re* Sheffield, 64 Fed. 833). In the case at bar the statute does not regard the character of the machinery as such but is directed solely against the casual incident of the patent. To say that the protection afforded by letters patent, because of its peculiar characteristics, presents a subject for the exercise of the police power of the state which may be specially selected for discriminatory legislation is to say that the state has power to seriously burden and impair a right granted by Congress under the authority of the Constitution. There is no such difference between patented articles and those of like character not patented as will justify such hostile legislation against the former as is exhibited in the statute under consideration. It is the right of a patentee to use and enjoy the privilege granted to him and to manufacture and vend the tangible property in which his discovery or invention is exhibited to the same extent and with the same freedom as those who deal in like but unpatented articles. Indeed, this view is expressed in one of the very cases relied on to reverse the judgment of the Circuit Court. In Webber *v.* Virgina, it was said:

"The combination of different materials so as to produce a new and valuable product or result, or to produce a well-known product or result more rapidly or better than before, which constitutes the invention or discovery, cannot be forbidden by the State, nor can the sale of the article or machine produced be restricted except as the production and sale of other articles, for the manufacture of which no invention or discovery is patented or claimed, may be forbidden or restricted."

In the manufacture and sale of articles of commerce the right to extend credit and to take negotiable paper which may readily be discounted and the proceeds turned back into the channels of the business that its volume may be increased, is a valuable one and is extensively and beneficially employed. That this right may under an assumed exercise of the police power of a state be denied those engaged in the manufacture and sale of articles covered by letters patent of the United States, and merely because of such fact, while its free exercise is permitted to all others, is inadmissible. With equal reason a state may destroy the negotiability of all notes taken by national banks, by other corporations organized under the laws of the United States, by citizens of other states, and in interstate commercial transactions, and may place all such notes in a special and discredited class for the better protection of its own citizens who may be the makers thereof. It is obvious that this cannot be done.

The judgment of the Circuit Court is affirmed.

Filed April 4, 1906.

36 (*Judgment.*)

And on the fourth day of April, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1905.

WEDNESDAY, *April* 4, 1906.

No. 2205.

OZAN LUMBER COMPANY, Plaintiff in Error,
vs.
UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Union County National Bank of Liberty, Indiana, have and recover against Ozan Lumber Company the sum of twenty dollars for its costs herein and have execution therefor.

April 4, 1906.

37 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing eight pages contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said Circuit Court of Appeals (except the transcript of the record from the Circuit Court of the United States for the Western District of Arkansas), in a certain cause in said Court wherein the Ozan Lumber Company is Plaintiff in Error, and the Union County National Bank of Liberty, Indiana, is Defendant in Error, as full, true and complete as the originals of the same now remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this twenty-fifth day of April, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

38 In the Supreme Court of the United States.

THE OZAN LUMBER COMPANY, Appellants,
vs.
THE UNION COUNTY NATIONAL BANK OF LIBERTY, IND., Respondent.

It is hereby stipulated by counsel in this cause, that the certified transcript of the record on file in this case in the Supreme Court shall be taken as a return to the writ of certiorari, waiving hereby the necessity of sending up a second transcript from the Court of Appeals.

Given under our hands this 2nd day of June, 1906.

(Signed) THO. C. McRAE,
U. M. ROSE,
For Appellants.
MORRIS M. COHN,
Att'y for Union Co. Nat'l B'k.

Endorsed: No. 2205. Ozan Lumber Co., Pl'ff in Error, *vs.* Union County Nat'l Bank of Liberty, Indiana. Stipulation as to return to Writ of Certiorari. Filed Jun- 4, 1906, John D. Jordan, Clerk.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Ozan Lumber Company is plaintiff in error, and Union County National Bank of Liberty, Indiana, is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Western District of Arkansas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and
40 removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of May, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

41 [Endorsed:] 229, 20263. June 11, '06. File No. 20263. Supreme Court of the United States. No. 761, October Term, 1905. Ozan Lumber Co., *vs.* Union County National Bank of Liberty, Indiana. Writ of certiorari and return. Filed Jun- 4, 1906. John D. Jordan, Clerk. Filed June 11, 1906.

Return of Writ.

UNITED STATES OF AMERICA, *Eighth Circuit, ss:*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Ozan Lumber Company, Plaintiff in Error, *v.* The Union County National Bank of Liberty, Indiana, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in St. Paul, Minnesota, this Eighth day of June, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

Copy.

37.

No. 761

Office Supreme Court
FILED
MAY 21 19
JAMES H. McKENN

IN THE

Supreme Court of the United States.

November Term, 1905.

OZAN LUMBER COMPANY,.....*Petitioner,*

v.

UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA,.....*Respondent.*

Petition for Certiorari

IN THE

Supreme Court of the United States.

November Term, 1905.

OZAN LUMBER COMPANY,.....*Petitioner,*

v.

UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA,.....*Respondent.*

Petition for writ of Certiorari to require the Circuit Court of Appeals for the Eighth Circuit to certify to this court for its review and determination the case of the Ozan Lumber Company v. Union County National Bank of Liberty, Indiana. Presented on behalf of said Ozan Lumber Company.

To the Honorable Supreme Court of the United States:

The above named petitioners respectfully show to this honorable court that on the first day of April, 1904,

said National Bank sued petitioner in the United States Circuit Court for the Texarkana Division of the Western District of Arkansas on eleven promissory notes, each for $375, falling due at different dates, and all in the following form:

"Thirty days after date, for value received, we promise to pay to the order of P. H. & F. M. Roots & Co. three hundred and seventy-five and no-100 dollars at Citizens' Bank, Prescott, Ark., with interest from date, at the rate of six per cent per annum until paid.

(Signed:) OZAN LUMBER CO.,
W. N. Bemis, Pt."

That the complaint in said cause showed that the plaintiff was a National Bank organized under act of Congress, and a citizen and resident of the State of Indiana, and that your petitioner, defendant therein, was a citizen of the State of Arkansas and resident of said district and division; and that said notes had, by the payees therein, been duly negotiated and transferred in the ordinary course of business, before maturity, for value. (Tr., p. 1.)

To which complaint petitioner answered as follows:

I.

Pleading a failure of consideration for said notes.

II.

Further answering defendant says:

"That said notes were given for a patented article,

covered by letters patent, No. 621043, granted March 14, 1899, and by letters patent No. 654954, granted July 31, 1900, to George W. Decker, copies of which letters patent and of the specifications and drawings of said patents, authenticated by the seal and certified by the Commissioner of Patents, defendant holds subject to inspection by the plaintiff, and subject to the orders of the court; and that said notes were given for said machine patented as aforesaid, and were not executed upon a printed form which showed upon its face that said notes were executed in consideration of a patented machine, implement, substance or instrument as required by section 493, of Sandel & Hill's Digest of the Statutes of Arkansas, and the plaintiffs herein have taken said notes, well knowing the same to be executed for such patented article, and therefore defendant denies that the plaintiff is an innocent holder and says that said notes are absolutely null and void.

"Wherefore, defendant prays judgment.

"McRae & Tompkins,
Attorneys for Defendants."

(Tr., p. 9.)

To the second paragraph of the answer the plaintiff demurred on the ground that "it does not set forth facts sufficient to constitute a defence herein." (Tr., p. 10.)

An amendment was filed to the first paragraph of the answer. (Tr., p. 10.) But this amendment was stricken from the files. (Tr., p. 12.) The first paragraph of the answer cuts no figure in the case as here presented.

The court sustained the demurrer to the second paragraph of the answer, and defendant excepted. (Tr., pp. 11, 12.)

The cause was then tried before a jury, which returned a verdict in favor of the plaintiffs for $4,698.50, and judgment was rendered acordingly, November 16, 1904. (Tr., pp. 12, 13.)

The opinion of the judge of the trial court, on the demurrer to the second paragraph of the answer, will be found at page 13 of the transcript *et seq.*

The defendant sued out a writ of error to the United States Circuit Court of Appeals, with the following assignment of errors:

"1. The said circuit court erred in sustaining the demurrer to the second paragraph of defendant's answer.

"2. Said circuit court erred in sustaining the motion to strike from the files the amendment to the first paragraph of defendant's answer." (Tr., p. 22.)

For writ of error, see transcript, page 25.

In the Circuit Court of Appeals the second assignment of error was not insisted upon. It is not insisted upon here.

On hearing of said cause in said Circuit Court of Appeals the judgment of the lower court was affirmed on the 4th day of April, 1906, as will be seen by reference to exhibit hereto attached, marked Exhibit A.

A copy of the opinion delivered in said cause in said Circuit Court of Appeals, is hereo attached, marked Exhibit B.

A certified copy of the entire transcript in said cause is herewith filed.

ASSIGNMENT OF ERROR.

The trial court in this cause erred in sustaining the demurrer to the second paragraph of defendant's answer, and the said Circuit Court of Appeals erred in affirming this action of said trial court.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of this court, and under its seal, directed to the United States Circuit Court of Appeals for the Eighth Circuit, or to the clerk thereof, commanding them to certify and to send up to this court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said cause, entitled in the court below, The Ozan Lumber Company, Plaintiff in Error, v. Union County National Bank of Liberty, Indiana, Defendant in Error, No. 2205, to the end that said cause may be reviewed and determined by this court as provided by the statute in such case made and enacted; and that your petitioners may have such other and further relief as to this court may seem just; and that said judgment of said Circuit Court of Appeals in said cause, and of said Circuit Court, and every part thereof, may be reversed and set aside by this honorable court; and petitioner would further show that pending the writ of error in the said Circuit Court of Appeals the judgment of the trial court was suspended by execution of court as provided by statute in

such case made and provided; and petitioner now prays that pending the present proceeding the execution of said judgment may be stayed on such terms as the court may direct; which will be faithfully complied with by your petitioner, who will ever pray, etc.

Respectfully,

T. C. McRAE,

U. M. ROSE,

For Petitioner.

37.

No. [redacted].

FILED
MAY 21 1906

IN THE

Supreme Court of the United States.

November Term, 1905.

OZAN LUMBER COMPANY,.....*Petitioner*,

v.

UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA,.....*Respondent*.

PETITION FOR CERTIORARI.

ADDITIONAL BRIEF FOR PETITIONER.

This case involves a constitutional question of great importance, one upon which the State courts have divided, and the lower federal courts have divided. If there is any reason for ever issuing a writ of certiorari to a Circuit Court of Appeals in the public interest under the statute, we submit that this is a case of that

kind. The court in a proper case will issue a writ of *certiorari* ever when it is not prayed for.

Security Trust Co. v. Dent, 187 U. S. 237.

This court in Patterson v. Kentucky, 97 U. S. 507, quote with approval what is said in Jordan v. Overseers of Dayton, 4 Ohio, 507.

We beg leave also to call the attention of the court to the decision in Arbuckle v. Blackburn, 51 C. C. A. 122, 113 Fed. 627, where his honor, J. Day, used this language:

"The fact that complainants produced Ariosa under a process protected by letters patent of the United States does not prevent it from coming within the operation of laws passed in the exercise of the police power of the state. The enactment of laws for the protection of health and to prevent imposition in the sale of food products is within this power, and the fact that the process by which it is made is protected by a patent, while it may prevent others from using it during the life of the patent, does not deprive the state of this power of regulation for the general good. Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Palmer v. State, 39 Ohio St. 236, 48 Am. Rep. 429."

Respectfully,

THOS. C. McRAE,

U. M. ROSE,

For Petitioner.

MAY 21
JAMES H. McK

No. ~~701.~~ ~~1906~~ 37.

IN THE

Supreme Court of the United States.

November Term, 1905.

OZAN LUMBER COMPANY,.....*Petitioner,*

v.

UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA,.....*Respondent.*

PETITION FOR CERTIORARI.

BRIEF FOR PETITIONER.

IN THE

Supreme Court of the United States.

November Term, 1905.

OZAN LUMBER COMPANY,.....*Petitioner*,

v.

UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA,.....*Respondent.*

PETITION FOR CERTIORARI.

BRIEF FOR PETITIONER.

This case involves the validity of the first section of the following act passed by the legislature of Arkansas. The facts we set forth in the petition for *certiorari* herein filed.

"Any vendor of any patented machine, implement,

substance or instrument of any kind, or character whatsoever, when the said vendor of the same affects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument, in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance, or instrument, as the case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void.

"SEC. 2. That the foregoing section shall also apply to vendors of patent rights and family rights to use any patented thing of any character whatever.

"SEC 3. That any vendor of any patented thing of any character, or any vendor of any patent right or family right to use any patented thing of any character whatsoever, who shall violate the provisions of section one of this act, shall upon conviction be punished by a fine of not more than three hundred dollars.

"SEC. 4. This act shall not apply to merchants and dealers who sell patented things in the usual course of business."

Approved, April 23, 1891. Kirby's Dig. St., Secs. 513-516.

Two kinds of similar statutes have been passed on by the courts, one relating to the sale of patent rights, the other relating to the sale of patented articles of merchandize. It is well a known fact that sales of this kind have often been attended by circumstances of fraud committed by transient persons who obtaned bills or notes which they transferred to *bona fide* holders, or to confederates claiming to be such, then disappearing, and leaving their victims to their fate. The reports are full of cases of that sort. Most of these victims are remote from the records of the patent office, and they become easily the prey of cunning and practiced experts in the art of deception.

There is a difference between cases involving the sale of patent rights and those involving the sale of patented articles, the former being an incorporeal species of property vested in the patentee, or his assigns, under the act of Congress; the latter being merely ordinary articles of merchandize as much subject, as we submit, to the police power of the State as any other kind of merchandize.

This difference has often been referred to by the courts. So far as the decisions as to the sale of patent rights are concerned, when they are in support of the validity of the statute they are in our favor *a fortiori*, and when they are based on the invalidity of the statutes they are not hostile to our position, because in but one of them was the question as to the validity of the

statutes as to the sale of merchandize considered or passed upon.

The statute was held valid by the State Supreme Court.

Wyatt v. Wallace, 67 Ark., 575.

That was a case of a sale of an interest in a patent right.

The assignee of the note may still sue on the original contract of sale.

Roth v. Merchants' & Planters' Bank,
70 *id.*, 200.
Little Rock v. National Bank, 98 U. S., 308.

Of all the statutes that we find on the subject, the Arkansas statute is the mildest. It does not apply to merchants and dealers selling patented things in the usual course of business, nor to sales where the patented article is only a part of the consideration of the note. In some of the States the statutes of a similar kind are highly penal, involving imprisonment.

It is natural that persons owning, or claiming to own, monopolies shall seek to amplify their immunities; but even they must yield to the paramount public welfare. Lotteries, formerly deemed inoffensive, claiming to be invincible and immortal, were not able to resist the rising tide of public sentiment; nor do we think that a claim that encourages a notorious class of professional swindlers will fare any better.

The distinction between police laws relating to

patents and those relating to patented articles has lately been adverted to by Mr. Dallas, Circuit Judge, in Pegram v. Am. Alkali Co., 122 Fed., 1005, saying:

> "The significance of the distinction here indicated is apparent. A patent secures to the patentee the right to debar others from making the thing patented; but it does not confer on him the right to make it. This he could do (though not exclusively) without a patent. Consequently his right of property in the patented article, when made, is not founded on government grant, and may as legitimately be subjected to State legislation as any other property."
>
> "The right to enjoy a new and useful invention may be secured to the inventor, and protected by national authority against all interference; but the use of tangible property which comes into existence by the application of the discovery is not beyond the control of State legislation simply because the patentee acquires a monopoly of his discovery."
>
> State v. Telephone Co., 36 Ohio St., 296; 38 Am. R., 582.

There is a manifest difference between the patent right and patented articles made under that right. The latter have entered into the common mass of merchandize of the State, and are necessarily within the police power of the State.

Stephens v. Cady, 14 How., 528.

In Castle v. Hutchinson, 25 Fed., 394, Mr. J. Woods

held that a similar statute as to the sale of a patent right was invalid; but he added:

"It is claimed that these cases are inconsistent with the opinion of the Supreme Court of the United States in Patterson v. Kentucky, 97 U. S., 501. But that case has reference to local restrictions upon the sale or use of tangible property; and, notwithstanding the property was manufactured or produced under letters patent, it was held that the enforcement of the statute of the State interfered with no right conferred by the letters patent. The case manifestly has no application here; the notes in suit having been given, not for tangible property, but for a right in letters patent, in respect to which the States can impose no restrictions."

The right to make articles under a patent is one thing, the law as to the evidence of sales of patented articles is another. The right of a citizen to fish in public waters is undoubted; his nets and seines and the fish that he catches are within the police power of the State.

Lawton v. Steele, 152 U. S., 138.
Geer v. Connecticut, 161 *id.*, 519.

There is a connection between all these, and between all things; but there are differences also, and legal distinctions are inevitable.

As to the domestic trade of the States, "Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States."

License Tax Cases, 5 Wall., 470.

Whether Congress could legislate on this subject is a question that does not arise here.

City of New York v. Miln, 11 Pet. 146.
Blalock v. Alling, 93 U. S., 99.
Mobile v. Kimball, 102, *id.*, 691, 697.
Cooley v. Board, etc., 12 How. 299.

Congress cannot exercise police power within the territory of a State.

U. S. v. DeWitt, 9 Wall., 41.

"The right to regulate the form and prescribe the effect of paper taken in commercial transactions has always been regarded as belonging to the States."

New v. Walker, 108 Ind., 40.

"There is a manifest distinction between the right of property in the patent, which carries with it the power on the part of the patentee to assign it, and the right to sell the property resulting from the invention or patent. A State has no power to say through its legislature that the patentee shall not sell his patent, or that its use shall be common to all citizens; for this would be in direct conflict with the law of Congress; and that portion of the opinion referred to, giving the patentee an unrestricted power to sell, has allusion alone to his right of property in the patent right, as that was the only question involved in the case. The discovery or invention is made property by reason of the patent, and this right of property the patentee can dispose of under the law of Congress, and no State legislation can deprive him of this right; but when the fruits of the invention or the article made by reason of the application of the principle discovered is attempted to be sold or used within the jurisdiction of a State, it is subject to its laws, like other property; and such has been the uniform decision of all the courts, State and Federal, upon this question.

"Chief Justice Kent, in the case of Livingston v.

Van Ingen, 9 Johns., 581, said: 'The power of Congress is only to define the right of property; it does not extend to regulating the use of it; that must be exclusively of local cognizance. If the author's book or print contains matter injurious to public morals or peace, or if the inventor's machine or other production will have a pernicious effect upon the public health or safety, no doubt a competent authority remains within the States to restrain the use of the patent right.' "

Patterson v. Comm., 11 Bush (Ky.), 311; 21 Am. R., 220.

"The protection of a citizen from fraud and imposition evidently falls within the just limits of the police power. This power reaches all persons and things within the State, and it may be rightfully exercised by the State over them, unless the power is denied by constitutional limitation, or by an act of Congress, or a treaty made pursuant to the constitution. The right of the State to make reasonable police regulations to protect the purchaser of the incorporeal property created by the patent laws from fraud and imposition in its sale is not denied to the States in express terms, either by the Feredal constitution or by the laws enacted by Congress. This power originally and inherently belonged to the States, and it yet remains with them, unless impliedly taken away by a fair construction of the constitution, or the laws enacted in pursuance thereof. Whether this power may be exercised by the States in regard to patent rights depends on the object, purpose and scope of the patent laws. 'The sole object and purpose of the laws,' said Mr. Justice Miller (*In re* Brosnahan, 18 Fed. Rep., 62) 'which constitute the patent and copyright system, is to give to the author and inventor a monopoly of what he has written or discovered; that no one else shall make or use or sell his

writings or his invention without his permission; and what is granted to him is the exclusive right; not the abstract right, but the right in him to the exclusion to everybody else. * * * The purposes of the patent law and the constitutional provision are answered when the patentee is protected against competition in the use of his invention by others, and when the law prevents others from infringing on his exclusive right to make, use, and sell the object to be accomplished. This proposition is fully supported by the Supreme Court in the case of Patterson v. Kentucky, 97 U. S., 501.'"

"The patented products of the invention become tangible property, and fall within the common mass, while the conception of the mind embodied in the invention and secured by the patent becomes clothed with the attributes of incorporeal property. As to the tangible products of an invention, it is settled by the case of Patterson v. Kentucky, 97 U. S., 501, that they fall within the domain of the police power of the State. That species of property is subject to taxation, and to the payment of debts, as other personal property. The national power will be fully satisfied if the property created by the patent be, for the time being, enjoyed and used exclusively, so far as under the policy of the several States the property shall be deemed fit for toleration and use. There is no need of giving this power any broader construction in order to attain the end for which it was granted."

Reeves v. Corning, 51 Fed., 785.

"Here there is no discrimination, for the statute simply prescribes a method by which our citizens can secure protection against fraud. The requirement that a record shall be made is not an unreasonable one, nor does it impede the free course of commerce; it simply compels an exhibition of the source of title and a

description of the thing offered for sale. The intangible character of the thing put into market, and its peculiar nature, distinguish it from other articles of commerce, and these make necessary laws of a peculiar character. It is the character of the commodity that makes necessary a law applying particularly to it, and not to articles of commerce in general, and in enacting a statute particularly applicable to a thing of a peculiar nature, there is no discrimination and no obstruction to the free course of commerce. Honest dealers cannot be harmed by such a law, and if dishonest ones are, all the greater the merit of the law."

Elliott, J., in Brechbill v. Randall, 102 Ind., 52.

A copyright or a patent right cannot be sold under execution from a State court.

Stephens v. Gladding, 17 How. 447.
Hankey v. Downey, 116 Ind., 119.

Yet certainly no one will contend that a patented article cannot be sold under an execution. That it may be thus sold was one of the points decided in the Gladding case.

The power to make police regulations for the protection of its citizens against fraud and imposition has not been taken from the States.

Brechbill v. Randall, 102 Ind., 528; 52 Am. R., 695.
U. S. v. Dewitt, 9 Wall., 41.
Mann v. Illinois, 94 U. S., 135.
Civil Rights Cases, 109 *id.*, 14.

In Hankey v. Downey, 116 Ind., 119, the court well said:

"The difference between the article

> manufactured and the right secured by the patent is clearly recognized. We need not decide whether it would be within the power of the State legislature to discriminate against articles manufactured under a patent; for all that we need decide—all that we have decided on this point—is, that it may reasonably regulate the transfer of intangible rights of a peculiar nature. It may be that the State cannot discriminate against property manufactured under a patent; but they may enact regulations respecting its use, sale and transfer, if it is treated as property of a similar class is treated."

The truth is, in the present case, the issue relates neither to the patent nor to the patented article, but to a class of promissory notes. It is thus twice removed from the incorporeal patent right. Suppose that the owner of the note should exchange it for a horse, would the horse be also exempt from the police power of the State? These notions are strictly Brahminical.

In Jordan v. Dayton, 4 Ohio, 295, the defendant was sued for practicing medicine without a license. He defended, saying that he was the owner of a patent from the United States granting the exclusive right to compound, use and sell a certain medicine which he had used as charged, as he had a right to do. This was a crucial case. The court said:

> "If the State should pass a law for the purpose of destroying a right created by the constitution, this court will do its duty; but an

attempt by the legislature in good faith to regulate the conduct of a portion of its citizens in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the Federal government."

This case was approved by Mr. J. Miller in the Brosnahan case.

A similar case is Thompson v. Staats, 15 Wend., 395.

The legislature may declare a note based on a gaming transaction, or other immoral consideration void.

Union Nat. Bank v. Brown (Ky.), 41 S. W., 273.

It naturally follows that the legislature may restrict the circulation of paper affording special facilities for the commission of fraud or immorality.

It is no defense to a charge for selling impure provisions that they were prepared under a patented process.

Palmer v. State, 39 Ohio St., 236; 48 Am. R., 429.

In Hackett v. State, 105 Ind., 201, 55 Am. R., 201, it was held that a state statute might limit the price which a telephone company might charge for their patented facilities.

In the execution of its police powers the State has a right "to enact such legislation as it may deem proper,

even in regard to interstate commerce for the purpose of preventing fraud or deception."

Schollenberger v. Pennsylvania, 171 U. S., 14.

"Where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests it will be sustained, whenever it can be done without the impairment of vested rights."

Louisville Ry. v. Kentucky, 161 U. S. 700.

"In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society."

License Cases, 5 How., 592.

The XIV Amendment does not limit the police power.

Giozza v. Tiernan, 148 U. S., 622.
In re Rahrer, 140, *id.*, 555.

"The fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality."

Holden v. Hardy, 169 U. S., 397.

"Police relates only to the internal concerns of one State; and commerce within it is purely a matter of internal regulation when confined to those articles which have become so distributed as to form items in the common mass of property."

Groves v. Slaughter, 15 Pet. 511.

The police power "is a power which originally and always belong to the States, not surrendered to the gen-

eral government, nor directly restrained by the constitution of the United States, and essentially exclusive."

U. S. v. Knight Co., 156 U. S., 11.
Moore v. Illinois, 14 How. 18.

"Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the States, and within legislative control; and in the exertion of such power the legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry."

Louisville Ry. v. Kentucky, 161 U. S., 701.

We must call special attention to the Brosnahan case, 18 Fed., 62, where Mr. J. Miller passed in review the police powers of the States in cases of this sort.

In New v. Walker, 108 Ind., 365, 58 Am. R., 40, one of these statutes relating to patent rights was held to be valid. To the same effect see

Shires v. Comm., 120 Pa., 368; 14 Atl., 251.
Reeves v. Baker, 51 Fed., 785.
Mason v. McLeod, 57 Kan., 105; 41 L. R. A., 548.
Sandage v. Studebaker Co., 142 Ind., 148; 34 L. R. A., 366.
Robertson v. Cooper, 1 Ind. App. Ct., 78.
Robertson v. Cooper, 1 Ind, App. Ct., 78.
Pinney v. First Nat. Bk., 75 Pac., 119.
S. C., 78 *id.*, 161.
Hankey v. Downey, 116 Ind., 119; 18 N. E., 271.

Pegram v. Am. Alkali Co. (Pa.), 122 Fed., 1004.

Haskell v. Jones, 86 Pa., 173.

The fact that the statute may indirectly affect patents furnishes no objection to its validity.

Slaughter-House Cases, 16 Wall., 62.

The court below quotes this clause from the opinion in Webber v. Virginia, 103 U. S., 347:

"The combination of different materials so as to produce a new and valuable product or result, or to produce a well known product or result more rapidly or better than before, which constitutes the invention or discovery, cannot be forbidden by the State, nor can the sale of the article or machine produced be restricted except as the production and sale of other articles, for the manufacture of which no invention or discovery is patented or claimed, may be forbidden or restricted."

But there is no restriction on sales in this act; and there is no reason to suppose that honest sales are in the least diminished thereby.

But as to the very point now under consideration the language in the Webber case is perfectly explicit.

"The patent for a dynamite powder does not prevent the State from prescribing the conditions of its manufacture, storage, and sale, so as to protect the community from the danger of explosion. A patent for the manufacture and sale of a deadly poison does not lessen the right of the State to control its handling and use. *The legislation respecting the articles which the State may adopt after the patents have expired, it may equally adopt during their continuance.* It is only the right to the invention or discovery—the incorporeal right—which the State cannot interfere with. Congress never

intended that the patent laws should displace the police powers of the States, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits." * * *

And again, the enjoyment of the right in the discovery "may be secured and protected by the national authority against all interference; but the use of the tangible property which comes into existence by the application of the discovery is not beyond the control of State legislation simply because the patentee acquires a monopoly in his discovery."

Webber v. Virginia, 103 U. S., 349.

In Haskell v. Jones, 86 Pa., 175, a similar statute was upheld, but the court, Judge Sharswood delivering the opinion, held that it had no operation where the assignee of the note took it without notice that it was given for a patent right. In this case the answer charged notice, and this allegation was admitted by the demurrer.

In Fry v. State, 63 Ind., 552, 30 Am. R., 238, a statute requiring railroads issuing passenger tickets limiting their liability to issue tickets showing the limitation printed in large type, was held valid, and not in violation of the commerce clause of the Federal constitution. There are many similar cases.

Even a contract by the State does not prevent the exercise of the police power.

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650.

The cases holding statutes relating to the sale of patent rights to be invalid, stand on special grounds not applicable here. "Congress has not only regulated the manner in which a patent right may be obtained, but it has prescribed the manner in which such right may be sold and conveyed, and has imposed the penalties for the infringement thereof."

Woolen v. Banker, note to Hallida v. Hunt, 22 Am. R., 69.

In the last analysis the question thus presented does not involve patent rights or patented articles. It only involves the right to issue negotiable paper at pleasure and unconditionally. But there is no inviolability about such a claim. In fact it never existed except under limitations. In early stages of society when such paper is not needed, it is frequently abolished.

Oldham v. Wallace, 4 Ark., 559.

It is not every one that can issue commercial paper. Guardians and administrators cannot do so.

7 Cycl. L. & P., p. 546.

In England private corporations have no such power unless specially granted.

4 Thomp. Corp., Sec. 5735.

So of law partners.

Weeks, Attorneys, Sec. 244.

So of municipal corporations.

1 Dillon, Mun. Corp., Sec. 127 n.

So of persons under disabilities, such as infants, married women and lunatics.

1 Rand. Commercial Paper, Sec. 388.

But it is not only the issue of commercial paper that may be regulated by law, but circulation of it also.

Thomas v. Richmond, 12 Wall., 356.

In that case the restriction was only upon certain classes of negotiable paper.

See also—

Lindsey v. Rottaken, 32 Ark., 619.

The statute in that case prohibited receipt as well as the issue and the passing of one particular class only.

Sand. & Hill's Dig. St., 1894, Sec. 549.

The statute in this case does not forbid the selling of patented articles either for cash or on credit; nor does it in any case annul the sale even if it is not complied with. It only lets in the light. It is certainly not obnoxious to the XIV Amendment.

Jones v. Brim, 165 U. S., 182.
Minneapolis Ry. v. Beckwith, 129 *id.*, 26, 29.

In Patterson v. Comm., 11 Bush., 311, 21 Am. R., 220, it was held that a State statute requiring oils to be inspected was valid as to patented oils. The court said:

> "The right of appellant to sell oil is not derived from the patent laws of Congress. If no patent had been issued the right to sell this character of property would exist; and the only benefit to be derived from the patent is that it

excludes others from selling the same kind of oil for a limited period, unless authorized to do so by the patentee, with the additional right on the part of the latter to sell his patent right in the mode prescribed by the patent laws."

In the case last cited the court said:

"When a legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would require with equal force its extension to others whom it leaves untouched."

See also—

Atchinson Ry. v. Matthews, 174 U. S., 96.

That there was need for this kind of legislation cannot be denied. It is equally plain that it was a reasonable exercise of legislative power. In Fidelity Mutual Life Association v. Mettler, 185 U. S., 326; Iowa Life Ins. Co. v. Lewis, 187 *id.*, 355, and in Home Life Ins. Co. v. Fisher, 188 *id.*, the subject of classification is fully discussed.

"Legislation may be directed against a class where any fair ground for the discrimination exists."

Missouri Ry. v. May, 194 U. S., 267.

In Maguoum v. Ill. Trust and Savings Bank, 170 U. S., 283, a classification for income tax varying with account of income was held valid. So in Am. Sugar Refining Co. v. Louisiana, 179 *id.*, 89, a classification making a distinction between farmers grinding and

refining their own sugar and molasses and others was upheld.

We do not conceive that the opinion of the court below covers the real ground of controversy. Its object seems to be to establish the proposition that the Statute makes a discrimination. This we should admit without argument. The exercise of the police power must always result in discrimination.

Beer Co. v. Massachusetts, 97 U. S., 25.

The real question is not as to discrimination, but as to the police power of the State.

We are aware that a baseless and arbitrary exercise of the police power is invalid. We prefer not to enter into that argument, as it would naturally be suggested that our opinion is biased. We prefer to give the opinion of a distinguished tribunal that speaks from experience.

"As a police regulation the statute [as to sale of patent rights] has proved itself to be valuable in that it has been the means of preventing gross frauds upon our citizens to which, before its enactment, they were subjected."

Shires v. Comm., 120 Pa., 368; 14 Atl., 251.

We are told in the opinion of the court below that we have mistaken the meaning of the opinion of this court in Patterson v. Kentucky, 97 U. S., 501.

We do not think so; but if we are wrong, learned judges have been equally misled.

Brechbill v. Randall, 102 Ind., 528; 52 Am. R., 695.

Hackett v. State, 105 Ind., 250; 55 Am. R., 201.

Webber v. Virginia, 103 U. S., 349.

Cooley, J., in People v. Russell, 49 Mich., 617; 43 Am. R., 479.

Herdick v. Rouessler, 109 N. Y., 127; 16 N. E., 198.

Tilson v. Gatling, 60 Ark., 119.

Reeves v. Corning, 51 Fed., 774, 785.

(Mr. Justice Miller in) *In re* Brosnahan, 18 Fed., 65.

Reeves v. Corning, 51 Fed., 785.

State v. Telephone Co., 36 Ohio St., 296; 38 Am. R., 586.

New v. Walker 108 Ind., 365; 58 Am. R., 40.

Union Nat. Bank (Ky.), 41 S. W., 273.

Palmer v. State, 39 Ohio St., 236; 48 Am. R., 429-431.

Chesapeake Telephone Co. v. Baltimore Telephone Co., 66 Md., 167.

Hankey v. Downey, 116 Ind., 119.

Pegram v. Am. Alkali Co., 122 Fed., 1005.

Fry v. State, 63 Ind., 565.

Reeves v. Corning, 51 Fed., 774.

Another objection that we make to the opinion of the court below is that it assumes that the notes sued on were given in a *bona fide* transaction. But that is a story that has not been told. If it is a *bona fide* transaction the plaintiff will not be harmed by the fullest inquiry. Some years ago corporations were allowed to put all their acts under the seal of secrecy; but now it

has dawned on the public mind that publicity is a thing that is essential to the general welfare.

There are many other authorities bearing collaterally on this point which will occur to the court; but to examine them here would extend this brief beyond all reasonable limits. We do not think that there is anything in them that militates against our contention.

Certainly it is time that this question, the source of so much dispute and contention, was settled authoritively.

Respectfully,

T. C. McRAE,
U. M. ROSE,
For Petitioner.

IN THE

Supreme Court of the United States

October Term, 1906.

OZAN LUMBER CO.....*Petitioner*,

v. No. 299.

UNION COUNTY NATIONAL BANK

of Liberty, Indiana.....*Respondent*.

On Certiorari to the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

BRIEF FOR PETITIONER.

On the 4th day of September, 1903, the Union County National Bank of Liberty, Indiana, brought this suit against the Ozan Lumber Company on eleven prom-

issory notes, each being for the sum of $375, executed to the P. H. & F. M. Roots Co., and by them assigned to plaintiffs.

Jurisdiction was based on diversity of citizenship. There is no controversy on that point.

Defendant answered as follows:

1. The notes sued on were given for a Car Loading Apparatus bought by defendant from the Roots Company, the manufacturer of said Apparatus; that this Company made false representations as to the qualities of the Apparatus, which turned out to be worthless; wherefore there was no consideration for the notes sued on.

This paragraph of the answer cuts no figure in the present hearing.

2. "Further answering, defendant says:

"That said notes were given for a patented article, covered by letters patent No. 621043, granted March 14, 1899, and by letters patent No. 654954, granted July 31, 1900, to George W. Decker, copies of which letters patent and of the specifications and drawings of said patents, authenticated by the seal and certified by the Commissioner of Patents, defendant holds subject to inspection by the plaintiff, and subject to the orders of the court; and that said notes were given for said machine patened as aforesaid, and were not executed upon a printed form which showed upon its face that

said notes were executed in consideration of a patented machine, implement, substance or instrument as required by Section 493 of Sandels & Hill's Digest of the Statutes of Arkansas, and that the plaintiffs herein have taken said notes well knowing the same to be executed for such patented article, and therefore defendant denies that the plaintiff is an innocent holder, and says that said notes are absolutely null and void.

"Wherefore defendant prays judgment." (Tr., pp. 7, 8.)

Defendant afterwards amended the first paragraph of the answer alleging that the Roots Company had failed to appoint an agent in Arkansas upon whom process could be served. (P. 9.) This amendment is also at present irrelevant. It was stricken from the files on the motion of the Plaintiff. (P. 11.)

The second paragraph of the answer is based on an act of the State of Arkansas, reading as follows:

"Any vendor of any patented machine, implement, substance or instrument of any kind, or character whatsoever, when the said vendor of the same affects the sale of the same to any citizen of this State on a credit, and takes any character of negotiable instrument, in payment of the same, the said negotiable instrument shall be executed on a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance, or instrument, as the

case may be, and no person shall be considered an innocent holder of the same, though he may have given value for the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and all such notes not showing on their face for what they were given shall be absolutely void.

"SEC. 2. That the foregoing section shall also apply to vendors of patent rights and family rights to use any patented thing of any character whatever.

"SEC. 3. That any vendor of any patented thing of any character, or any vendor of any patent right or family right to use any patented thing of any character whatsoever, who shall violate the provisions of section one of this act, shall upon conviction be punished by a fine of not more than three hundred dollars.

"SEC. 4. This act shall not apply to merchants and dealers who sell patented things in the usual course of business."

Approved, April 23, 1891. Kirby's Dig. St., Secs. 513-516.

The plaintiff demurred to the second paragraph of the answer "because it does not set forth facts sufficient to constitute a defence herein." (P. 9.)

The demurrer was sustained. (P. 10.)

On a trial before a jury the plaintiff recovered a judgment against the defendant for $4,698.65. (P. 11.)

The opinion of the District Judge on the demurrer begins at p. 12. The court held that the act above copied is void as being unconstitutional.

A writ of error was sued out by the defendant to the Circuit Court of Appeals, where the judgment of the lower court was affirmed. (P. 31.)

The opinion of the Circuit Court of Appeals begins on page 27 of the transcript.

The cause was removed into this court by writ of *certiorari* issued May 29, 1906. (P. 32.)

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals of the Eighth Circuit Court of Appeals erred in holding that the act of the legislature of the State of Arkansas of April 23, 1891, quoted above, is unconstitutional and void, as applicable to the facts of this cause.

2. The said Circuit Court of Appeals erred in affirming the judgment of the United States Circuit Court for the Western District of Arkansas, Texarkana Division, whereas the same should have been reversed.

As to the Law.

We have a brief on file in this cause, presented with the petition for *certiorari*, in which reference is made to most, if not all, the authorities bearing on the point in issue. But since that time the exact point has been

discussed and decided in the opinions handed down by this honorable court during the present term in the cases of Allen v. Riley and Woods v. Carl; thus rendering farther argument on our part superfluous.

Respectfuly,

THO. C. McRAE,

U. M. ROSE,

For Petitioner.

Office Supreme Court, U. S.
FILED.
FEB 21 1907
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1906.

[redacted]

OZAN LUMBER COMPANY,
Petitioner,

vs.

UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA,
Respondent.

37.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT.

20,263.

MORRIS M. COHN,
Attorney for Respondent.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1906.

No. 299.

OZAN LUMBER COMPANY,
Petitioner,

vs.

UNION COUNTY NATIONAL BANK OF LIBERTY, INDIANA,
Respondent.

STATEMENT OF THE ISSUES.

The Union County National Bank of Liberty, Indiana, on September 4, 1903, instituted its suit in the United States Circuit Court for the Western District of Arkansas, against the petitioner in this cause, upon eleven negotiable promissory notes, executed by the petitioner to P. H. & F. M. Roots Company or order, dated at Prescott,

Arkansas, September 6, 1902, payable thirty days apart, and each for three hundred and seventy-five dollars, and interest from date until paid at the rate of six per cent. per annum. It was alleged, among other things, that these notes were duly negotiated and transferred to it, before maturity, for value. Other proper allegations appear in the complaint regarding demand, nonpayment, protest and existing liability (Pr. Rec., 1-7, inc.).

To this complaint the petitioner here filed an answer. The *first* paragraph of the answer set up the general defense that the respondent had not obtained the notes in faith for value, before maturity, and pleaded failure of consideration (Id., pp. 7, 8). And on this a trial was had before a jury and a verdict was rendered in favor of respondent. (This is not copied into the printed record here; but appears in the record sent up from the Court of Appeals.) And judgment was rendered accordingly. And no exceptions were saved to this judgment.

The answer referred to had a second paragraph, which undertook to rely upon a statute of the State of Arkansas. It is in these words:

"Further answering, defendant says:

"That said notes were given for a patented article, covered by letters patent, No. 621043, granted March 19th, 1899, and by letters patent, No. 654954, granted July 31, 1900, to George W. Decker, copies of which letters patent and of the specifications and drawings of said patents, authenticated by the seal and certified by the Commissioner of patents, defendant holds subject to inspection by the plaintiff, and subject to the orders of the court; and that said notes were given for said machine

patented as aforesaid, and were not executed upon a printed form which showed upon its face that said notes were executed in consideration of a patented machine, implement, substance or instrument as required by section 493 of Sandels' and Hill's Digest of the Statute of Arkansas, and that the plaintiffs herein have taken said notes, knowing the same to be executed for such patented article, and therefore defendant denies that the plaintiff is an innocent holder and says that said notes are absolutely null and void" (Id. 8).

And, upon demurrer, based upon the ground that this paragraph did not set forth facts sufficient to constitute a defense (Id. 9), the court referred to held the said paragraph to be insufficient to constitute a defense, but gave the petitioner thirty days in which to file an amended answer (Id. 10). But petitioner never sought to amend as to said second paragraph.

In ruling upon the demurrer the court held the act relied upon to be unconstitutional and void, for the reasons set forth in the opinion of Judge Rogers (Id., pp. 12-19, inc.). And, upon error to the Court of Appeals for the Eighth Circuit, this ruling was sustained, for the reasons set forth in the opinion of that court (Id., pp. 27-30, inc.).

The reasons assigned by the learned courts for their rulings did not correspond. And the reasons given by the Court of Appeals do not seem to have met with the approval of this Court.

There were, however, matters covered by the demurrer which were not ruled upon by either of these courts, which, if the positions taken in this brief are ten-

able, will sustain the original ruling upon the demurrer to the paragraph of the answer under consideration. The statement of the positions so taken will be deferred until the reasoning in the decision of the District Judge has been presented.

THE OPINION OF JUDGE ROGERS.

Judge Rogers, after a careful review of the decisions of this court, was of the opinion that the act was unconstitutional because it excepted merchants and dealers who sold patented things in the usual course of business.

To enable this Court to obtain a correct knowledge of the terms of the act, the sections thereof are here copied.

The sections upon which reliance is placed by petitioner are sections 513 to 516, inclusive, of Kirby's Digest of the laws of Arkansas; formerly sections 493 to 496, inclusive, of Sandels & Hill's Digest of the laws of that state. These sections read as follows:

"Sec. 513. Any vendor of any patented machine, implement, substance or instrument of any kind or character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this state on a credit, and takes any character of negotiable instrument in payment of the same, the said negotiable instrument shall be executed upon a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument as the case may be, and no person shall be considered an innocent holder of the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said negotiable instrument, and

all such notes not showing on their face for what they were given shall be absolutely void.

"Sec. 514. The foregoing section shall also apply to vendors of patent rights, and family rights to use any patented thing of any character whatever.

"Sec. 515. Any vendor of any patented thing of any character, or any vendor of any patent right or family right to use any patented thing of any character whatsoever, who shall violate the provisions of section 513 shall, upon conviction, be punished by a fine of not more than $300.

"Sec. 516. This act shall not apply to merchants and dealers who sell patented things in the usual course of business."

Judge Rogers, among other things, said:

"If the only question involved was the constitutionality of the first section of the act of April 23, 1891, I should feel inclined to uphold the statute in this case, where the consideration of the note is for a patented machine and not for an interest in a patent right or patent right territory. * * * But the third section of the act makes it a criminal offense to violate the first section and the fourth section of the act excepts from the provisions of the act 'merchants and dealers who sell *patented things*, in the usual course of business" (Pr. Rec., 14).

"It will be observed," he further said, "that the provisions of section 4 of the act which except from the operation of the act 'merchants and dealers who sell patented things in the usual course of business' do not except from the operation of the act merchants and dealers who sell patent rights or patent right territory. By the plain provisions of this act it is made to apply to all persons except 'merchants and dealers who sell patented things in the usual course of business.' How shall the act be reconciled with the last paragraph of the first section of the XIV article of the Constitution of the United

States, which forbids, in terms, any state 'to deny to any person within its jurisdiction the equal protection of the laws?' How can the state, acting within this provision of the Constitution, protect by its laws 'merchants and dealers who sell patented things in the usual course of business' and deny the same protection to other persons, as, for instance, manufacturers of the same things who 'sell them in the ordinary course of business?' " (Id., 14). "If the statute in question is a perfect defense for this defendant, must it not also be a perfect defense in all similar cases, without reference to who the plaintiff may be, or what his business may be?" (Id., 15).

The learned judge then held that the decisions in the cases of *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S., 150, and *Connelly* v. *Union Sewer Pipe Company*, 184 U. S., 540, and *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 179, sustained the position that the statute was void, because of the improper classification made by the exception referred to.

In the case of *Connelly* v. *Union Sewer Pipe Company, supra*, the eighth section of the anti-trust act of Illinois avoided every contract or agreement in violation of its provisions, and the ninth section provided that the provisions of the act should "not apply to agricultural products or live stock in the hands of the producer." And the Court, per Mr. Justice Harlan, there held that the attempted exception rendered the act illegally discriminative and void.

Many other decisions of this court uphold the doctrine contended for.

Dobbins v. *Los Angeles*, 195 U. S., 223, 236;
Lake Shore Ry. Co. v. *Smith*, 173 U. S., 684;

Magoun v. *Illinois Trust & Savings Bank*, 170 U. S., 283;
Minnesota v. *Barber*, 136 U. S., 313;
Soon Hing v. *Crowley*, 113 U. S., 709;
Ward v. *Maryland*, 12 Wall., 418.

And the views of this Court, upon this subject, have been followed by the Supreme Court of Arkansas.

See *Exparte Deeds*, 75 Ark., 542;
Woods v. *Carl*, 75 Ark., 328, 335;
Exparte Ft. Smith Bridge Co., 62 Ark., 461.

And the decisions of other courts fully sustain this attitude of the Court.

See *State* v. *Sheriff, etc.*, 48 Minn., 236;
People v. *Max*, 99 N. Y., 377;
Dickson v. *Poe*, 159 Ind., 492;
Hannon v. *State*, 66 Ohio St., 249;
Brown v. *Jacobs P. Co.*, 115 Ga., 429;
In re Flucks, 157 Mo., 125;
Stinson v. *Muskegon Brewing Co.*, 100 Mich., 347;
Gillespie v. *People*, 188 Ill., 176;
Templar v. *Michigan St. Board*, 90 N. W., 1058.

Arbitrary and unreasonable classifications in legislation are condemned as well by the state courts, as by this honorable Court. And the world has not been loser thereby.

In the Supreme Court of Arkansas, the views of Judge Rogers have found active support; as might well be expected, from the reputation Judge Rogers bears in Arkansas.

On May 6, 1905, in the case of *Woods* v. *Carl*, 75 Ark., 328, in an opinion by Mr. Justice McCullough, the

Supreme Court of Arkansas, while it did not feel called upon to rule upon the point, in a case involving the validity of the law now under consideration, referred to the opinion of Judge Rogers, and said: "The act may be unconstitutional and void as to its application to part of the subject matter, and valid as to others, and we think this rule preserves, unimpaired, the provisions of the statute with reference to notes given for the sale of patent *rights*" (75 Ark., 335). In this way distinguishing the case before it from the case here at bar.

On May 27, 1905, that court had occasion to pass upon an act involving the same question, and indistinguishable in principle from this one, and there it avoided the act, relying upon the doctrine of this court in *Connelly* v. *Union Sewer Pipe Company*, 184 U. S., 540. The case referred to is *Exparte Deeds*, 75 Ark., 542.

In that case the law of Arkansas (Kirby's Digest, Sec. 6886) denounced a penalty against "any person, either as owner, manufacturer or agent," "who, without having a license, "shall travel over or through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage and vehicles, or either of said articles," but provided that the act should "not apply to any resident merchant in said county."

THE ACT IN QUESTION IS UNENFORCEABLE AS TO RESPONDENT UNDER THE PROVISIONS OF THE CONSTITUTION OF ARKANSAS.

The ruling in the case of *Exparte Deeds*, above mentioned, was applied, not only under the Fourteenth

Amendment to the Constitution of the United States, but also under section 18 of article 2 of the Constitution of 1874 of Arkansas, which provides that the General Assembly "shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."

Exparte Deeds, 75 Ark., 542, 545, citing,
State v. *McGinnis*, 37 Ark., 362;
State v. *Marsh*, 37 Ark., 356;
State v. *Dechamp*, 53 Ark., 490, and other cases.

In *Exparte Ft. Smith Bridge Co.*, 62 Ark., 461, a similar principle was applied, under the Constitution of the state, to the assessment of a bridge. And the state cases in other states, referred to, in some instances, applied the doctrine of improper discrimination under the state constitutions.

See *Low* v. *Rees Pr. Co.*, 41 Neb., 127;
Stinson v. *Muskegon Brewing Co.*, 100 Mich., 347.

So that the rulings of the Supreme Court of the state, on grounds not dealt upon by either the judge of the Circuit Court or the judges of the Court of Appeals, sustain the judgment upon the demurrer heretofore mentioned.

DOES THE ACT, IN EFFECT, DEPRIVE NOTES GIVEN UNDER THE CIRCUMSTANCES, MENTIONED IN THE PLEADINGS, OF THE QUALITY OF NEGOTIABILITY?

The two paragraphs of the answer, taken together, show that P. H. & F. M. Roots Company manufactured and sold to the petitioner one standard Decker Log

Loader, according to certain specifications for which the notes in suit were executed. And the allegations of the complaint, as sustained by the verdict, show that the notes were negotiable, in good faith, before maturity, for value, in the ordinary course of business by said P. H. & F. M. Roots Company to the respondent.

It thus appears that, so far as the Union County National Bank was concerned, the notes were given by the petitioner to the Roots Company for a sale of a Log Loader. The statute having excepted "merchants and dealers who sell patented things in the usual course of business" it would be but just and proper, that this transaction should be held not to be covered by the prohibition of the act, denying to this paper the character of negotiable paper, since in all cases not covered by the statute the law merchant prevailed and had prevailed for a long time. Kirby's Digest, Sec. 512, says:

"Nothing in the preceding section* shall apply to a bill of exchange or negotiable promissory note, transferred in good faith and for value before maturity, but such instrument shall be governed by the rules of the law merchant concerning commercial and negotiable paper." And there is a proviso which takes notes and drafts given for patent rights or patent right territory out of this category. The proviso was enacted on April 9, 1891. The other part of the law has been in force for many years. (See Gantt's Digest of the Law of Arkansas, 1874, Sec. 566.)

Upon their face the notes in suit were in the ordinary form of negotiable commercial paper and negotiated, as

*Relating to assignments of written choses in action.

they were, at Liberty, Indiana, in the ordinary course of business, the respondent, thus receiving and discounting the same, could not be expected to take with actual notice of anything, except what the notes disclosed. If any one was at fault for sending the notes out in that form, it was the petitioner. And, at least as against the respondent, it should not be permitted at this late day to annul the same. That, it is submitted, accords an advantage to the party at fault as against an innocent person whom it has helped to impose upon. And, while it is true that the second paragraph charges knowledge to the respondent, that issue was set at rest by the jury in passing upon the same issue (that is notice) under the first paragraph of the answer, the effect of the verdict being to hold that the respondent held the notes without notice, in good faith, for value, before maturity.

WAS THE LAW OF ARKANSAS OR THAT OF INDIANA APPLICABLE AS TO THE RESPONDENT?

See *Tilden* v. *Blair,* 21 Wall., 241;
In re Conrad, Fed. Cases, No. 3, 126;
Orr v. *Lacey,* Fed. Cases, No. 10, 589;
Johnson v. *Gawtry,* 83 Mo., 339;
Wells Fargo Co. v. *Van Sickle,* 64 Fed. 944;
Bank v. *Sutton Mfg. Co.,* 3 C. C. A., 1; s. c., 52 Fed., 191.

In the cases last cited the doctrine seems to be held that, although the notes were dated in Arkansas and were payable there, yet if they were discounted in Indiana, they would, as to the party discounting them, be judged by

the law of Indiana. And if that position is correct then the second paragraph of the answer presented no defense.

THE SECOND PARAGRAPH OF THE ANSWER WAS NOT SUFFICIENT IN LAW, IN ANY EVENT, TO CONSTITUTE A DEFENSE.

The matter set out in the second paragraph might all be true, and yet the respondent might be entitled to recover. For until it appeared from this paragraph that the notes were not taken by a merchant or dealer in the usual course of business the statute was not met.

See *United States* v. *Cook*, 17 Wall., 168;
Maxwell Land Grant Co. v. *Dawson*, 151 U. S., 586, 604, 605;
Corinne Mill Co. v. *Johnson*, 156 U. S., 574;
Thompson v. *State*, 37 Ark., 408;
Carter v. *Marks*, 17 Tex., 539.

Though the section providing that "this act shall not apply to merchants and dealers who sell patented things in the usual course of business," is a later section of the act to that which is invoked by petitioner, it in terms qualifies all the terms of that act and makes a part and parcel of the law, in the sense that it must be read into all parts of that law. And in pleading the law it was the duty of the petitioner to state that the transaction in question was not a case of sale by a merchant or dealer in the ordinary course of business.

Some courts, it is true, say, that an exception need only be negatived where it appears in the enacting clause;

but that where it appears in a subsequent section it need not be negatived. But this loses sight of those cases in which several sections of an act must be taken and considered together to get the sense of all. Taking a cue, in this connection, from the decision in *Connelly* v. *Union Sewer Pipe Company*, 184 U. S., 540, already mentioned, where it was held that the existence of the section rendering the act inapplicable to agricultural products or live stock while in the hands of the producer or raiser, rendered the whole act unenforceable, it is apparent that section 516 of Kirby's Digest was such a part of the act, of which it formed part, as that the pleader was required to negative the matter therein set forth.

In *United States* v. *Cook*, 17 Wall., 168, 174, 175, the court dealt with this point, and said:

"Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty."

And it was also said that the same rule applied in civil cases. And the court there said that "commentators

and judges have sometimes been led into error by supposing that the words 'enacting clause,' as frequently employed, means the section of the statute defining the offense," etc. This, it was said, was "a misapprehension of the term" (17 Wall., 176).

In *Thompson* v. *The State*, 37 Ark., 408, and in *Carter* v. *Marks*, 17 Tex., 539, the exception seems to have appeared in subsequent sections, or other laws.

Since the matter pleaded was in abatement of the action, peculiar to a plea in abatement at common law, it should have been pleaded fully and with precision. But whether this be true or not, the matter omitted from the paragraph left the paragraph open to the objection that though the notes were given for a patented article, covered by certain letters patent, and though the notes were not executed in a form which showed upon their face that they were given for a patented machine, and though knowledge of these matters might be possessed by the holder, *non constat* that the notes may thus still have been negotiable under the law of Arkansas, because the patented article may have been sold by a merchant or dealer in the ordinary course of business.

And the objection thus made was of such a substantial character that it could be utilized on motion in arrest of judgment (*Gould* v. *Kelley*, 16 N. H., 551), or on appeal even though no demurrer had been interposed in the court below (*R. R. Co.* v. *Brown*, 23 Ill., (13 Peck) 94; *R. R. Co.* v. *Sumner*, 24 Ill. (14 Peck), 631).

CONCLUSION.

In the light of the argument herein presented, the record fails to disclose that there was any error in sustaining a demurrer to the second paragraph of the answer. And, whether this Court shall uphold the views of the judge of the Circuit Court or place the judgment upon other grounds, we submit that the demurrer was properly sustained.

Respectfully,

MORRIS M. COHN,

Attorney for Respondent.

IN THE

Supreme Court of the United States.

ON PETITION OF OZAN LUMBER COMPANY
FOR A WRIT OF CERTIORARI.

OZAN LUMBER COMPANY, PETITIONER,

vs.

UNION COUNTY NATIONAL BANK
OF LIBERTY, INDIANA, RESPONDENT.

BRIEF FOR THE RESPONDENT.

A. The complaint filed in the circuit court on September 4, 1903, shows that this is a suit based upon eleven promissory notes, negotiable in form, dated at Prescott, Arkansas, September 6, 1902, payable to the order of P. H. and F. M. Roots Company at the Citizens' Bank, Prescott, Arkansas, each for $375, with interest from date until paid at the rate of 6 per cent per annum. It further shows that at the time the said notes were executed the payee was a corporation ex-

isting in, and was a citizen and resident of the State of Indiana, and that the defendant in error was a corporation, organized under the National banking act, and a citizen and resident of said State of Indiana; that the citizenship and residence being, as aforesaid, the said notes were by the said P. H. and F. M. Roots Company duly negotiated and transferred in the ordinary course of business, to defendant in error, for value, before maturity, and that defendant in error acquired the same in good faith. There were other allegations showing demand of payment of the notes, refusal on the part of the maker (petitioner) to pay them, and a prayer for judgment for the sum due, including protest fees, etc. (Printed record, pp. 1 to 8 inc.)

An answer to this complaint, containing two paragraphs, was filed on November 11, 1903.

The first paragraph admitted the execution of the notes, but alleged that the notes had been executed to the said P. H. and F. M. Roots Company for a Standard Decker Log Loader, which it manufactured, and which it had guaranteed would perform the work of loading cars with logs, but that there had been a failure of consideration because the said loader would not accommodate a car of fifty-two inches in height, was constructed of poor material, was easily broken and could not be kept in repair, and was worthless for the purposes for which plaintiff in error had

purchased the same; and it denied that the notes were by the payees duly negotiated and transferred in the ordinary course of business to respondent before maturity for value, and denied that respondent had obtained the same in good faith. (Printed record, pp. 8, 9.) There was no denial of the allegation that the payee of the notes and the respondent were located in Indiana at the time the notes were executed and negotiated to the bank. There was no allegation showing how long after the execution of the notes petitioner discovered that the log loader was defective. There was no allegation that it had ever notified anybody of that contention.

The second paragraph of the answer set up that the notes were given for a patented article, covered by letters patent No. 621043, granted March 14, 1899, and by letters patent No. 654954, granted July 31, 1900, to George W. Decker duly issued by the commissioner of patents; that the said notes were not executed upon a printed form which showed upon its face that said notes were executed in consideration of a patented machine as required by section 493 of Sandels & Hill's Digest of the statutes of Arkansas, and that the defendant in error had taken the notes with knowledge, and not as an innocent holder, and that the notes were absolutely null and void. (Printed record, p. 9.)

To this second paragraph a demurrer was interposed on November 12, 1903, in behalf of defendant in

error, setting up that the same did not set forth facts sufficient to constitute a cause of action. (Id., p. 10.) On March 8, 1904, this demurrer was sustained. (Id., p. 11.) Thirty days' time from March 8, 1904, were given to the plaintiff in error in which to file an amended answer. (Id., p. 11.) On Many 10, 1904, the cause was continued to the next succeeding term. On November 15, 1904, plaintiff in error filed its amendment to the first paragraph of the answer, the same being objected to. (Id., pp. 10, 12.) The amendment recited "that the said notes sued on were and are void and not binding upon it, because the payees, P. H. and F. M. Roots Company was a foreign corporation doing business in the State of Arkansas, and had not filed with the secretary of state a certificate designating a citizen of the state as its agent upon whom service and other process could be made, and its principal place of business as required by the laws of the State of Arkansas." (Id., p. 10.)

A motion was filed to strike this amendment for the following reasons: Because the cause was set for trial on this day, and would soon be reached for trial, and because the matter set forth in said amendment was not germane to the matter set out in the first paragraph of the answer, and, if a fact, which was denied, was and could have been known long ago to the plaintiff in error, and because it set up immaterial matter. (Id., pp. 10, 11.) The motion to strike was

sustained the next day. (Id., p. 12.) Later on that same day a jury trial was had of the issues presented by the complaint and the first paragraph of the answer, and a verdict was returned in favor of the defendant in error the same day. (Id., pp. 12, 13.) No exceptions were saved to the judgment, though exceptions were noted to the rulings on the demurrer and motion to strike. (Id., p. 13.)

A prayer for appeal and pretended assignment of errors appears to have been filed January 13, 1905. The so called assignment of errors recites:

"1. The said circuit court erred in sustaining the demurrer to the second paragraph of defendant's answer.

"2. Said circuit court erred in sustaining the motion to strike from the file the amendment to the first paragraph of defendant's answer." (Id., pp. 22, 23.)

B. The record, as above abstracted, shows that the negotiable notes sued upon herein, were executed to the P. H. and F. M. Roots Company, doing a manufacturing business in Indiana, by the Ozan Lumber Company, for a log loader, which either prior or subsequent thereto was claimed by the Ozan Lumber Company to be defective, and that the notes were negotiated in due course of business before maturity, to the Union County National Bank by the said Roots

Company in Indiana. No bill of exceptions having been filed by the plaintiff in error, the court does not know what issues went to the jury. But it must have been decided that the bank was either a good faith holder for value before maturity without notice, or the loader must have been proven to be all that it was intended to be, or both issues must have been passed upon. The fact is that the bank was shown to have received the notes in due course of business, at its place of business, at Liberty, Indiana, from the P. H. and F. M. Roots Company, before maturity, and without notice of any kind as to the consideration of the notes. And no evidence to the contrary was offered. And the issue of failure of consideration was immaterial, and was shut out. The only issue before the court, on the petition for a certiorari, as I understand, is, whether the demurrer to the second paragraph of the answer should have been sustained.

THE DEMURRER WAS PROPERLY SUSTAINED.

The sections upon which reliance is placed by petitioner are sections 513 to 516, inclusive, of Kirby's Digest of the laws of Arkansas; formerly sections 493 to 496, inclusive, of Sandels & Hill's Digest of the laws of that state. These sections read as follows:

"Sec. 513. Any vendor of any patented machine, implement, substance or instrument of any kind or

character whatsoever, when the said vendor of the same effects the sale of the same to any citizen of this state on a credit, and takes any character of *negotiable instrument* in payment of the same, the said *negotiable instrument* shall be executed upon a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument as the case may be, and no person shall be considered an innocent holder of the same before maturity, and the maker thereof may make defense to the collection of the same in the hands of any holder of said *negotiable instrument*, and all such notes not showing on their face for what they were given shall be absolutely void.

"Sec. 514. The foregoing section shall also apply to vendors of patent rights, and family rights to use any patented thing of any character whatever.

"Sec. 515. Any vendor of any patented thing of any character, or any vendor of any patent right or family right to use any patented thing of any character whatsoever, who shall violate the provisions of section 513 shall, upon conviction, be punished by a fine of not more than $300."

"Sec. 516. This act shall not apply to merchants and dealers who sell patented things in the usual course of business."

ARE THE PROVISIONS OF THE LAW OF ARKANSAS ENFORCIBLE?

At the time the act was passed which is embraced in the sections of Kirby's Digest, already quoted, the law merchant prevailed in that state. (Kirby's Digest, sec. 512.) It had been in force, unreservedly, and without any exception, as far back as 1869. (See Gantt's Digest of the laws of Arkansas, sec. 566.) But the effect of this act was to take away not only the character of any negotiable instruments, given in payment for any patented machine, implement, substance or instrument of any kind, when the vendor effected a sale thereof to any citizen of the state on a credit, but destroyed its validity entirely if it was not made in a printed form, showing on its face that it was executed in consideration of a patented machine, implement, substance or instrument. The act, as the words I have italicized show, in terms takes negotiable paper given for patents out of the category, only for the reason that they are given for patents. Another act, passed earlier at the same session, also made all notes, drafts and bills of exchange executed or drawn in payment of any patent right or patent right territory subject to all defenses. (Kirby's Digest, section 512.) And section 514 of the same digest applied the provisions of section 513 to vendors of patent rights and family rights to use any patented thing of any

character whatever. And section 515 imposed a fine on any vendor who should disregard the provisions of sections 513 and 514.

So that the state legislature by this legislation not only withdrew patent rights and patented things as such from the benefits of the law generally conceded to others, except so far as related to dealers or merchants who sold patented things in the usual course of trade, but it also imposed fines upon all persons who undertook to disregard the law. Clearly this legislation discriminated in two ways against patentees and their rights; that is, it put patent rights and patented articles in a condemned class all by themselves, and not applied to any other rights or things, and it also arbitrarily excepted dealers and merchants from the terms of the act.

Unless the act is construed to have no application extraterritorially, this act seeks to punish non-residents who, outside of the state, enter into contracts with residents, for the sale of patented rights or patented articles, and take negotiable paper in disregard of the terms of the act.

Cooley Cons. Lim., *127 *seq.*

State vs. Lancashire Ins. Co., 66 Ark., 466, 476, 477.

But, passing over this point, the act is unconstitutional on other grounds.

THE RULING OF THE COURT OF APPEALS.

The opinion of the Court of Appeals will be before this court on the consideration of the petition for a certiorari. It shows that the entire attack made by the law of Arkansas, heretofore quoted, is confined to patent rights and articles that are sold under patents. And it is shown that the law does not apply if the same thing is not unfortunate enough to be patented, or is fortunate enough to be made after the patent has expired. It is likewise shown therein that the doctrine of this court, as announced in the case of Webber vs. Virginia, 103 U. S., 344, sustained the ruiing of the Court of Appeals. This court there said:

"The combination of different materials so as to produce a new and valuable product or result, or to produce a well known product or result more rapidly or better than before, which constitutes the invention or discovery, cannot be forbidden by the state, *nor can the sale of the article or machine produced be restricted except as the production and sale of other articles, for the manufacture of which no invention or discovery is patented or claimed, may be forbidden or restricted.*" (103 U. S., 347.)

Upon what possible, tenable, theory can the state legislature, by wholesale sweep, consign all of the owners or assignees of patents or patent rights and

patented articles to a class by themselves, and deny to them equal rights to those given to others? Does the mere fact that a patent has been issued justify the state legislature in singling out the right or thing for unfavorable discrimination? Can the state, under our form of government, level its legislation exclusively against patent rights and patented articles, solely because they have been patented, and so discountenance and defeat the policy of congress in encouraging inventive genius? The act in question does not apply to an article as to which a patent has not yet been issued, and only a patent has been applied for; but it is aimed directly at the final act of patenting—as though the issuance of a patent was a badge of frand and imposition. May the state legislature put the legal rights granted by congress in a condemned class, upon a theory that rights given by congress are fraudulent and tabooed things? The legislation in question has done this.

The act does not put sales of livestock or trademarks or copyrights upon the same plane as patents—although dealers in livestock are notoriously more tricky than other classes of dealers, and sales of trademarks and copyrights may be fraught with more elusive advantages than patent rights. If the act undertook to say that contracts, such as loans made by national banks, should, where the loans were made in national currency or national bank notes, be put in a

condemned class by themselves, it could not be more objectionable than this act. And this act is more objectionable than for a state legislature to say that no note given to a national bank shall be valid where the interest taken is in excess of a prohibited rate; the same legislation not applying to any other kind of notes.

If the courts are so diligent to defeat discrimination against individuals, they will not be less diligent in defeating discrimination when it affects patents and patented articles, as such.

In re Sheffield, 64 Fed., 836, (as to patents, etc.)

Ins. Co. vs. Morse, 20 Wall., 445, 453.

Crandall vs. Nevada, 6 Wall., 35.

Weston vs. Charleston, 2 Pet., 449.

Bank vs. Treasurer, 25 Fed., 749.

But there is an additional reason, I submit, why this legislation is vicious. It is this, that the subject of patents was committed by the Constitution of the United States to congress, and has been dealt with by congress, and this legislation conflicts with the policy of the Federal Constitution and acts of congress relating to patents and patent rights. Congress contemplated when they passed acts granting rights for a number of years to patentees, that the right to the patent, and the right to the principle covered by the

patent should not be confined to the patentee, but that the same would later, as other rights, enter into the world of commerce and trade, upon equal terms and conditions with other things. And by the acts of congress the congress indicated that no general scheme of condemnation by any state legislature was justifiable. That such legislation as is under consideration here is against the policy so established by the federal legislative body, seems to me to be too clear for serious argument. See, in addition to Webber vs. Virginia, supra—

Wooten vs. Banker, Fed. Cas. No. 18,030; s. c. 2 Flip., 33.

Ex parte Robinson, Fed. Cas. No. 11,932; s. c. 2 Biss., 309.

Helm vs. Bank, 43 Ind., 167.

Holliday vs. Hunt, 70 Ill., 109.

Cransom vs. Smith, 37 Mich., 309.

Crittenden vs. White, 23 Minn., 24.

State vs. Lockwood, 43 Wis., 403.

Grover & Baker S. Ma. Co. vs. Butler, 53 Ind., 454.

State vs. Butler, 71 Tenn. (3 Lea.), 222.

And see—

Bement vs. National Harrow Co., 186 U. S., 70, hereafter cited.

In Woolen vs. Banker, Fed. Cas. No. 18,030, Mr. Justice Swayne, sitting on the circuit, held as to a similar law of Ohio, which undertook only to destroy the negotiability of the note, but not to avoid it entirely, that it was unconstitutional. And he said:

"That the Constitution of the United States has conferred upon the congress the power to promote the progress of science and the useful arts, by securing for limited time, to authors and inventors, the exclusive right to their respective writings and discoveries, by section 8, art. 1, is no more certain than that such power has been exercised by the enactment of patent laws, and that no state can limit, control, or even exercise the power. Congress has not only regulated the manner in which a patent may be obtained, but it has prescribed the manner in which said right may be sold and conveyed, and has imposed the penalties for the infringement thereof. The national government has, therefore, made a patent right property. The patentee has paid the government for the monopoly, and it is bound to protect him and his assignee in the use and enjoyment of it. Any interference whatever by any state, *that will impair the right to make, use or vend any patented article*, or the right to assign the patent or any part of it, is forbidden by the highest organic law. The statute in question is such an interference, and is unconstitutional."

In that case several other authorities were cited, amongst others the decision of Mr. Justice Davis *in re* Robinson, Fed. Cas. No. 11,932, and other cases decided by the Supreme Court of Indiana and Maine.

Ex parte Robinson, Fed. Cas. No. 11,932, above mentioned, was a case which involved an act, containing two sections closely resembling the law now under consideration, enacted by the legislature of Indiana.

An elaborate brief was filed by counsel for plaintiff. Mr. Justice Davis sat in the case and delivered the opinion of the court. And he held such an attempt on the part of the legislature to be "unauthorized." He said:

"The property in inventions exists by virtue of the laws of congress, and no state has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of congress on the subject, *he has the right to go into the open market anywhere* within the United States and sell his property. If this were not so, it is easy to see that a state could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of congress, which regulate its transfer, and destroy the power conferred upon congress by the Constitution."

Exactly the same ruling was made by the Supreme Court of Indiana, with reference to the manner of executing notes for patents, etc., required by the law of that state.

Helm vs. Bank, 43 Ind., 167.

Grover & Baker Co. vs. Butler, 53 Ind., 454.

And so by the Supreme Court of Michigan:

Cranson vs. Smith, 37 Mich., 309.

In this last case it was said:

"The state may punish frauds upon its citizens committed by any manner of false pretenses. But it cannot lawfully assume that the rights granted by the United States are presumably fraudulent, nor can it punish frauds committed by persons holding those privileges on any different grounds than others." (37 Mich., 312.)

In Illinois the same doctrine has been held.

Holliday vs. Hunt, 70 Ill., 109.

So Minnesota:

Crittenden vs. White, 23 Minn., 24.

So Wisconsin:

State vs. Lockwood, 43 Wis., 403.

So Tennessee:

State vs. Butler, 3 Lea., 222.

We contend, moreover, that the failure on the part of congress to deal with that subject indicated the fact that it was intended that there should be no such legislation adverse to patents. The congress selected the means and conditions connected with the patent right.

In this case the plaintiff below resided in Indiana, and the notes do not show any defect whatever. It is alleged that the plaintiff obtained the notes in the regular course of business. What kind of position does such an act leave it in? Obviously if this law is put into force against it, its rights may be defeated, but not otherwise; and this only by reason of the fact that the government granted patent rights of the greatest consequence to one George W. Decker, and it, amongst others, manufactured and sold this article.

While there are cases which hold or seem to hold a different doctrine, they are not sanctioned by any utterances of federal courts.

Because it has been held that the fact that a patent had issued did not take a patented article out of the state's inspection and licensing laws, where those laws were not so moulded as to apply exclusively to patented articles, provided that such laws were passed under the police powers of the states, it is far from following that the law in controversy is enforcible. Patterson vs. Kentucky, 97 U. S., 501, does not decide that such a law as is in question here is permissible. (See the opinion of the Court of Appeals.)

The police power of the state does not extend to prohibiting acts that are not harmful.

Dobbins vs. Los Angeles, 195 U. S., 223, 236, *seq.*

Lochner vs. State of New York, 198 U. S., 45, 56.

Eden vs. People, 161 Ill., 296, 308.

Railway Co. vs. Jacksonville, 67 Ill., 37; s. c. 16 Am. Rep., 611.

State vs. Scougal, 3 S. Dak., 67, 68.

In re Jacobs, 99 N. Y., 98.

Ex parte Jentsch, 112 Cal., 468.

Beebe vs. State, 6 Ind., 501; s. c. 63 Am. Dec., 391.

Smiley vs. McDonald, 42 Neb., 5; s. c. 60 N. W., 355.

Railroad Co. vs. State, 47 Neb., 549; s. c. 66 N. W., 624.

And there could be no pretense that the exercise of the state's police power called for the discrimination and method of dealing with patent rights and patented articles alluded to and covered by the act in question here. In fact, there is a wide distinction between the regulating and inspection of illuminating oil, or licensing peddlars of sewing machines (where the one of the other may, *inter alia*, embrace patented articles), and undertaking to divest patent rights and patented articles of value in respect of the sale and transferability thereof, upon equal terms with other rights or articles.

This act of the legislature in question is here being invoked in a federal court to defeat recovery by the citizen of another state, of the amount due by a citizen of the state, under notes ordinary negotiable under the law merchant and the statutes of the state. And a federal court is asked to enforce the act, which is solely aimed at patent rights and patented articles. Must a federal court become the instrument to defeat the value of patent rights and patented articles, by reason of a law which, in name, is said to have been passed under a state's police power, but which was not passed to reach any evil solely attributable to the evil results of the sale of patent rights and patented articles? Such a law as that under consideration is not a proper expression of the state's power.

As was said in Dobbins vs. Los Angeles, 195 U. S., 223, 236:

"In Lawton vs. Steele, 152 U. S., 133, 137, Mr. Justice Brown, speaking for the court, said upon the subject: 'To justify the state in thus interposing its authority, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual and

unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final and conclusive, but is subject to the supervision of the courts.' "

And, as was further said in Dobbins vs. Los Angeles, quoting from the opinion of Mr. Justice Harlan in Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, 558:

"No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived."

Is not a patent right granted or secured under the Constitution of the United States? And is it not also true that no right granted or secured under an act of congress can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may be derived?

Other remarks in the same case, pertinent to the present argument, may be found in the case referred to.

See, also, the recent cases of San Francisco National Bank vs. Dodge, 197 U. S., 70, and Covington vs. First National Bank of Covington, 198 U. S., 100, 113, 114.

That this argument is sustained by the latest expression of this court on patents cannot be questioned. In Bement vs. National Harrow Co., 186 U. S., 70, 91, in which case the court was called upon to determine what rights patentees had, under patent laws, as against other legislation, after citing and commenting upon the previous decisions of that court, in Patterson vs. Kentucky, 97 U. S., 501, and of other federal courts, the court said:

"Notwithstanding these exceptions, the *general* rule is absolute freedom in the use or sale of rights under the patent laws of the United States." (186 U. S., p. 91.)

AUTHORITIES CITED BY OPPOSING COUNSEL.

In their brief in the Court of Appeals, counsel relied upon several cases. Amongst others they relied upon certain expressions of Mr. Justice Miller, *In re* Brosnahan, 18 Federal, 62. The point there was whether a law of Missouri concerning the sale of oleomargarine was legal. It happened that a patent had been issued for the process of making oleomargarine. The law referred to was passed to prosecute the manufacture and sale of oleaginous substances, or compounds of the same, in imitation of the pure dairy product. There was no discrimination against the patented article as such. The law did not single out the patented article, and confine itself to that, but em-

braced the manufacture and sale of all oleaginous substances, or compounds thereof. At that time no act of congress was in existence relating to the subject. And, according to a well known doctrine of the federal courts, this was deemed to be a subject which the states might deal with, even to the extent of affecting interstate commerce, so long as congress did not legislate upon the subject, and so long as there was no discrimination against any particular product.

That the states could not discriminate, even under such circumstances, is well settled.

> Scott vs. McDonald, 165 U. S., 58, 91, *seq.*
> Walling vs. Michigan, 116 U. S., 446, 459, 460.
> Minnesota vs. Barber, 136 U. S., 313, 326, 328.

And, since the opinion of Mr. Justice Miller, in the case referred to, was delivered, congress having passed a law relating to oleomargarine, such legislation as that of Missouri has been condemned by this court.

It would have been condemned even had no act of congress been passed.

> Schollenberger vs. Pennsylvania, 171 U. S., 1.
> Collins vs. New Hampshire, 171 U. S., 30.

This court will take note of this difference between the subject of *interstate commerce* and *patents*, in the present connection, viz: That the states are en-

titled to deal with the subject of commerce upon a large scale, but their power to deal with patents and rights flowing from patents, including the incidental right of sale of patented articles, is much more restricted. But this fact was not noted by Mr. Justice Miller, and, indeed, he was not required to note it in the Brosnahan case, because in that case there was no question regarding discrimination against patented articles, as such.

Opposing counsel cite a decision of Judge Baker, in Reeves vs. Corning, 51 Fed., 785. That decision is entirely in conflict with the decisions of Mr. Justice Davis, Mr. Justice Swayne, and the other courts to which reference was made in foregoing parts of this brief. The opinion in that case carries the doctrine of Patterson vs. Kentucky, 97 U. S., 501, far beyond the requirements of that case. But even there the following language was used by the learned district judge, who delivered the opinion:

"Our attention is called to the case of Castle vs. Hutchinson, 25 Fed. Rep., 394, where the second section of the statute of Indiana, requiring the seller of the patent to write the words, 'Given for a patent right,' in any note given for a patent right, and making the failure to do so a criminal offence, was held to be unconstitutional. *This decision may well be supported on the ground of an unjust and unauthorized discrimination. It singles out notes given for patent*

rights from the common mass of such property, and requires them, to be valid, to show on their face the motive of their consideration. Such discrimination would seem to render the second section of the statute unconstitutional. If the section had required all notes to exhibit on their face the consideration for which they were given, a very different question would have been presented. In my opinion, the case of Castle vs. Hutchinson, supra, is correctly decided; but it is by no means decisive of the question under consideration." (51 Fed., 787.)

In that case the law under consideration required the sellers of patent rights to file in the offices of the county clerks copies of letters patent duly authenticated, and affidavits to the effect that such letters were genuine.

As stated, the decision is not in accord with the great weight of authority in holding such a law valid.

But whether this be so or not, no distinction was drawn in that case between patent rights and patented articles, and none was called for. And the cases do not justify any distinction. A patent right has no value except for the exclusive right of manufacture and sale which it accords. Without the free right to manufacture and sell the articles covered by the patent, the right thereby given would be a farce. Such is the doctrine of Webber vs. Virginia, supra.

Opposing counsel seem to wholly misapprehend the point here under discussion. Assuming that the police power of the state might be rightly exercised, as to patented articles, might it be exercised in this instance? Opposing counsel say there is no hostility against the patent laws or against federal legislation evinced by the legislation here in question. The very statement shows its utter baselessness.

This legislation goes beyond most of the legislation of the character, which has recently marred the statute books of the states, in applying to patent rights and patented articles a distinctly hostile attitude, in nullifying negotiable paper given for patent rights, patent territory and patented articles—even going so far as to attempt to reach the innocent holder of negotiable paper, and also making the act criminal.

I have urged that such treatment leveled solely at patent rights and patented things, is grossly discriminative.

Counsel speak of the statute as one which is intended to protect the weak. Are the patents which congress gives so essentially tainted with fraud, in their inception, that they are *per se* fraudulent and to be dealt with as a class by themselves, so that to them shall not be accorded the same free market accorded to other things, as is necessary to ready sale, enjoy-

ment and advantage? If the legislature of Arkansas had provided that fraud in the inception of negotiable instruments, whether as to the consideration or otherwise, should be a valid defense in all cases, this would —going as far as any federal case goes—have justified a court and jury in disallowing a negotiable instrument based on the sale of a patent right, patent territory, or patented article. But that is the utmost limit of the doctrine. In Webber vs. Virginia, 103 U. S., 347, cited by counsel, while it was held that patented articles were subject to the tax and license laws of the state,—in this being unlike patent rights—it was not held that such laws might be discriminative against patented articles. On the contrary, it was there held that they could not be discriminative, and the license laws which affected patented articles there in question were held to be invalid because discriminative. In that instance the state law did not discriminate against patent rights or patented articles as such. But it discriminated against foreign articles of commerce.

I have called attention to other cases holding such laws as those under consideration here to be discriminative and invalid. And see further:

Pegram vs. American Alkali Co., 122 Fed., 1000, 1005.

In re Sheffield, 64 Fed., 833, 836.

Brimmer vs. Rebman, 138 U. S., 78.

Voight vs. Wright, 141 U. S., 62.

In re Sheffield, 64 Fed., 833, 836, Judge Barr had before him a license law of Kentucky, relating to the sale of patent rights and patented articles, imposing double the fee imposed upon other goods, and he said:

"We think the correct doctrine is that the grant of patent rights is given by the United States subject to the exercise of the police power of the several states of the Union, and that the patented articles are subject to the taxing power of the several states, *if there be no discrimination in such taxation as between other property in the state and the patented article or thing.*" (64 Fed., 836.)

Counsel cite cases relating to the exercise of powers by states over fish and over bridges. Exclusive power has never been conferred on congress to deal with either of those subjects. So far as they pertain to the seas or navigable waters, or to such interstate commerce as requires congressional action, it has been held that the states may not deal therewith. But patents, like national banks, are in a different category. These exist by virtue of congressional legislation. They are invested with character and efficacy by congressional legislation. And they cannot be bereft of that character by state action. If, under police powers, states may not discriminate in matters falling under the head of interstate commerce, they are *a fortiori* deprived of the power to discriminate against grants of patent rights, and all the incidents

growing out of such grants. Just as the right of congress to deal with imports, goes to the point of disabling the state from interfering with the sales of the imported articles in original packages, so does the grant of the patent imply the right to put it into practical shape and sell the patented article.

It would be an egregious anomaly to sustain such hostile, discriminative legislation.

As to the authorities cited by opposing counsel on the subject of permissible classifications in state legislation, in reply, I suppose, to the opinion of the learned judge of the circuit court, it requires only to remember that in those cases there was a basis for the classification, which was founded in reason. The present case, as Judge Rogers so ably showed, and as is indicated in the succeeding part of this brief, is ruled by those cases in which the discriminative classification was held to be unreasonable, unequal and unjust. Under this legislation patentees and their assignees, and vendors of patented articles, rights and territory, are denied equal rights in respect of contracts, and are denied equal standing in the courts as to obligations taken, which are accorded to holders of copyrights, holders of trademarks, live stock dealers, and dealers in other wares of much more shady character than patented articles could be, from any conceivable standpoint.

OPINION OF THE CIRCUIT JUDGE.

It was held by the judge of the circuit court, in a very carefully considered opinion, that the act copied into sections 513 to 516 of Kirby's Digest is unconstitutional, because it is improperly discriminative on other grounds. Without rhyme or reason it condemns the transactions respecting patent rights and patented articles, involving the sale thereof, except sales by dealers and merchants in the usual course of business. If the construction hereafter contended for is not adopted by this court, manufacturers who manufacture and sell articles that are covered by a patent are taken out of the protection accorded to dealers and merchants. To use the language of Judge Rogers, in the opinion copied into the record:

"How shall this act be reconciled with the last paragraph of the first section of the Fourteenth article of the Constitution of the United States, which forbids in terms any state to 'deny to any person within its jurisdiction the equal protection of the laws?' How can the state, acting within this provision of the Constitution, protect by its laws 'merchants and dealers who sell patented things in the usual course of business' and deny the same protection to other persons; as, for instance, manufacturers of the same patented things who 'sell them in the usual course of business?' If a merchant or dealer has sold the article in the usual

course of business, for which the notes in question were given, and, having sued on them, could recover, notwithstanding the statute in question, must not the same right to recover be accorded all other persons under like circumstances? If the statute in question is a perfect defense for this defendant, must is not also be a perfect defense in all similar cases, without reference to who the plaintiff may be, or what his business may be? If any citizen of this state has a right to set up a certain statutory defense, must it not also be a perfect defense in all similar cases, without reference to who the plaintiff may be? If any citizen of this state has a right to set up a certain statutory defense, must not all other citizens, without reference to their occupation, whether of this state or any other state, have the same right? The decision of this case involves the answer to these questions." (Pr. Rec., p. 16.)

As was said by Judge Rogers, quoting the language of the supreme court:

"The Fourteenth amendment, in declaring that 'no state shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property, but that equal protection and security should be given to all under

like circumstances in the enjoyment of their personal and civil right; that all persons should be equally entitled to pursue their happiness *and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the same pursuits by others under like circumstances; that no greater burden should laid upon one than are laid upon others in the same calling and condition,* and that in the ministration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences." Citing Barbier vs. Connolly, 113 U. S., 27, 31. (Pr. Rec., pp. 19, 20.)

And the learned judge further said, quoting from the utterances of the supreme court, in the course of his opinion:

"The difficulty is not met by saying that, generally speaking, the state, when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to preserve public objects. For this court has held that classifications 'must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justi-

fied by calling it classification.'" * * "'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reason of the equality clause of the Fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and not a mere arbitrary section," citing Gulf, Colorado & Santa Fe Railway Company vs. Ellis, 165 U. S., 150, 155, 159, 160, 165. (Pr. Rec., p. 21.)

And it was held that inasmuch as section 516 could not be dropped from the act, without departing wholly from the legislative intent in passing the act, the whole act was inoperative. (Pr. Rec., p. 21, citing Connelly vs. Union Sewer Pipe Co., 184 U. S., 540, 564, 565.)

If in the numerous cases where the acts of this legislature have been condemned on similar grounds, these were held to be illegal because of no sound principle of attempted classification or discrimination, no possible ground can be found to sustain the attempted classification in this legislation.

Cp., Dobbins vs. Los Angeles, 195, U. S., 223, 236.

Connelly vs. Union Sewer Pipe Co., 184 U. S., 540.

Cotting vs. Kansas City Stock Yds. Co., 183 U. S., 79.

Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283.

Railway Co. vs. Ellis, 165 U. S., 150.

Soon Hing vs. Crowley, 113 U. S., 709.

Minnesota vs. Barber, 136 U. S., 313.

Ward vs. Maryland, 12 Wall., 418.

In re Stockton Laundry, 26 Fed., 611.

Railroad Co. vs. Taylor, 86 Fed., 168.

State vs. Sheriff, Etc., 48 Minn., 236; s. c. 51 N. W., 112.

People vs. Marx, 99 N. Y., 377.

Dickson vs. Poe, 159 Ind., 492.

Hannon vs. State, 66 Ohio St., 249.

Brown vs. Jacobs P. Co., 115 Ga., 429.

In re Flucks, 157 Mo., 125.

Low vs. Rees Pr. Co., 41 Neb., 127; s. c. 59 N. W., 362.

Stimson vs. Muskegon Brewing Co., 100 Mich., 347; s. c. 59 N. W., 142.

Gillespie vs. People, 188 Ill., 176.

Templar vs. Michigan St. Board, 90 N. W., 1058.

QUESTIONS RELATING TO THE PROPER CONSTRUCTION OF THE PROVISIONS OF STATE LAW UNDER CONSIDERATION.

Two other questions arise under the act, assuming that section 513 is valid and enforcible.

Was this not a transaction by a dealer within the meaning of the statute? Is this act so framed as to relate to interstate transactions?

Obviously the act contemplated that a sale by a patentee or his agent of a patented article or patent right should, if a transaction between persons within the state, be put in a condemned class all by itself. Although negotiable instruments were recognized in section 513 as the usual and customary incidents of sale, and had for many years been governed by the law merchant, as hereafter shown, so far as patent rights and incidents were concerned hostile discrimination was displayed. But this hostile discrimination was not to apply if the transaction was one in the ordinary course of trade in which a manufacturer and dealer or merchant sold an article which was covered by a patent. If this be a true view, the P. H. and F. M. Roots Company was within the spirit of section 516, above cited, for, although it manufactured the log loader in question, it does not seem to have done so on order, but to have sold it out of stock. Reference

being had to the language of section 513, it appears that the "said negotiable instrument shall be executed upon a printed form, and show upon its face that it was executed in consideration of a patented machine, implement, substance or instrument, as the case may be," etc.

This language does not in apt terms apply to a manufacturer and dealer who manufactures and sells an article which happens to have been patented. Manufacturers deal upon an extensive scale, in ice boxes, bicycles, typewriters, pens, etc., and are never understood to come under such a provision.

Then again, this was a transaction outside of the state, in interstate commerce, and, according to the usual rules of construction, the law should not receive a construction that gave it an extraterritorial effect.

Bond vs. Joy, 7 Cr., 350.

United States vs. Palmer, 3 Wheat., 610.

State vs. Lancashire Ins. Co., 66 Ark., 466.

Rossette vs. Cableman, 8 Exch., 361.

Nor was it to receive a construction that related to interstate commerce.

Gunn vs. White Sewing Machine Co., 57 Ark., 24.

Mortgage Co. vs. Winchell, 62 Ark., 160.

Cp., Shook vs. Singer Machine Co., 61 Ind., 520.

Sewing Ma. Co. vs. Butler, 53 Ind., 454.

There is no allegation in the answer that the contract upon which the notes were based was entered into in the State of Arkansas, and it is not therefore made to appear that the transaction was within the State of Arkansas; nor does it appear that the notes were delivered to the Roots Company in the State of Arkansas. It appears that the Roots Company in Indiana received notes dated in Arkansas, and payable in Arkansas, but for use in Indiana. Then, the notes were to be judged by the law of Indiana. This is settled by well adjudged cases.

Tilden vs. Blair, 21 Wall., 241.

In re Conrad, Fed. Cases, No. 3,126.

Orr vs. Lacey, Fed. Cases, No. 10,589; 4 McLean, 243.

Johnson vs. Gawtry, 83 Mo., 339.

Wells Fargo Co. vs. Vansickle, 64 Fed., 944.

Farmers' National Bank vs. Sutton Mfg. Co., 3 C. C. A., 1; s. c. 52 Fed., 191.

And the laws of Indiana should apply, especially in favor of the defendant in error. As to notes in the usual form of negotiable paper, in the hands of Indiana parties, discounted in the usual course of business in Indiana by the payee, with a bank there, it would be highly unjust to allow the application of a special Arkansas law, relating to the sale of patents and patent rights, when nothing was inserted in the

notes to put a purchaser on inquiry. Ordinarily this note would have been negotiable, subject to the rules of the law merchant, in Arkansas.

Kirby's Digest, sec. 512.

Having been issued in this form, was not and ought not the maker be held estopped to plead the matter set out in the second paragraph of its answer, as to the bank? Was not the issuance of the notes in this form an act of the lumber company, which in terms represented to the world that the consideration and form of the notes were in all respects what they, on their face, purported to be; and could it afterwards attack the notes so given as to a holder in good faith, for value, who was not charged to have known anything about the law of Arkansas or with any other knowledge that would deprive it of the character of a good faith holder. (See Murray vs. Lardner, 2 Wall., 110, and other cases *infra;* also Clark vs. Evans, 13 C. C. A., 433; s. c. 66 Fed., 263; Garish vs. Bragg, 55 Vt., 329; Hereth vs. Merchants' Nat'l Bank, 34 Ind., 380; Thompson vs. Love, 61 Ark., 81; Adder vs. Tankersley, 28 S. W., 346.)

If a person carelessly issues a check with a blank space, whereby the amount can be raised, the banker will be protected.

Benjamin & Chalmers, Bills, Notes and Checks, p. 236.

Or when a note is issued containing a forged signature, a party who is negligent in endorsing and issuing it will be bound by estoppel.

Benjamin & Chalmers, p. 91.

Why should not this doctrine apply to one who had sent out notes, used beyond the state, without any indications of the true character or consideration of the notes?

See, on the subject of estoppel, in this connection—

Ottawa National Bank, 105 U. S., 342.

Haskell vs. Jones, 86 Pa. St., 173.

Abeon vs. Goodspeed, 72 N. Y., 108.

Fort Scott vs. Eads Brok. Co., 54 C. C. A., 437; s. c. 117 Fed., 51.

Webb vs. Hearne Bay Comm. L. R., 5 Q. B., 642, 655.

In re R. R. Co. L. R., 3 Q. B., 583.

Freeman vs. Cooke, 2 Exch., 654.

Gardiner vs. Gagee, 1 Allen, 502.

Draper vs. Saxton, 118 Mass., 427.

The possession by the Union County National Bank of the notes was sufficient evidence of its being a good faith holder for value, to sustain the allegation of the complaint if there had been no verdict here to sustain that view.

Murray vs. Lardner, 2 Wall., 110, 121.

Hotchkiss vs. Banks, 21 Wall., 354, 359.

King vs. Doane, 139 U. S., 166.

Kneeland vs. Lawrence, 140, U. S., 209.

Clark vs. Evans, 13 C. C. A., 433; s. c. 66 Fed., 263.

And see—

Garish vs. Bragg, 55 Vt., 329.

Hereth vs. Merchants' National Bank, 34 Ind., 380.

Thompson vs. Love, 61 Ark., 81.

CONCLUSION.

Verily, the endeavor of the Union County National Bank to recover on the eleven negotiable notes here in suit, due and owing for over three years, is attended with vast difficulty and expense. It seems that however often the Ozan Lumber Company has a day in court, to settle the issues, the more anxious it has become to have still further days in a still higher court, and it seems never to tire of this endless litigation. We submit that there is nothing in the judgment rendered by the circuit court, and the affirmance thereof by the Court of Appeals of the Eighth Circuit, which

in any way departs from the settled doctrines of this court, and that the application for a certiorari in this case ought to be denied.

Very respectfully submitted,

MORRIS M. COHN,
Attorney for Respondent.

OZAN LUMBER COMPANY *v.* UNION COUNTY NATIONAL BANK OF LIBERTY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 37. Submitted November 5, 1907.—Decided December 2, 1907.

Woods & Sons v. *Carl*, 203 U. S. 358, and *Allen* v. *Riley*, 203 U. S. 347, followed as to the power of a State, until Congress legislates, to make such reasonable regulations in regard to the transfer of patent rights as will protect its citizens from fraud.

There cannot be an exact exclusion or inclusion of persons and things in a classification for governmental purposes, and a general classification, otherwise proper, will not be rendered invalid because certain imaginary and unforeseen cases have been overlooked. In such a case there is no substantial denial of the equal protection of the laws within the meaning of the Fourteenth Amendment.

State legislation which regulates business may well make distinctions depend upon the degrees of evil without being arbitrary and unreasonable. See *Heath & Milligan Mfg. Co.* v. *Worst*, *post*.

The purpose of the statute of Arkansas providing that all notes given for payment of patented articles must show that they were so given, and permitting defenses to be made to such notes in the hands of third parties, is to create and enforce a police regulation, aimed principally at itinerant vendors of patented articles, and the distinction in § 4 that it shall not apply to merchants and dealers who sell patented articles in the usual course of business is founded upon fair reasoning and is not such a discrimination as violates the equal protection provisions of the Fourteenth Amendment.

Where the case was decided below solely upon constitutional grounds upon which the decision cannot rest, it must be remanded and if there are any other facts they can be presented upon another trial.
145 Fed. Rep. 344, reversed.

THIS case comes here upon certiorari directed to the Circuit Court of Appeals for the Eighth Circuit. The action was commenced in the United States Circuit Court for the Western District of Arkansas, upon certain promissory notes, which the defendant, the Ozan Lumber Company, in its answer alleged had been given by it in payment for a patented article, such notes not being executed upon a printed form, showing they were given in consideration of a patented machine, as required by the statute of Arkansas. Sections 513 to 516, inclusive, Kirby's Digest Laws of Arkansas.

A demurrer to the defense was interposed on the ground that it did not state facts constituting a defense. The Circuit Court sustained the demurrer, because, as it held, the act was in violation of the Fourteenth Amendment, as denying to the plaintiff the equal protection of the laws. 127 Fed. Rep. 206. The case was taken by writ of error to the Circuit Court of Appeals, where the judgment was affirmed for the reason that the act was an illegal discrimination against patented articles. 145 Fed. Rep. 344. The application by defendant for a certiorari to review that judgment was granted.

Mr. T. C. McRae and *Mr. U. M. Rose*, for petitioner, submitted:

There is a manifest difference between the patent right and patented articles made under that right. The latter have entered into the common mass of merchandise of the State, and are necessarily within the police power of the State. *Stephens* v. *Cady*, 14 How. 528.

As to the domestic trade of the States, Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. *License Tax Cases*, 5 Wall. 470.

Whether Congress could legislate on this subject is a question that does not arise here. *New York* v. *Miln*, 11 Pet. 146;

Blalock v. *Alling*, 93 U. S. 99; *Mobile* v. *Kimball*, 102 U. S. 691, 697; *Cooley* v. *Board, &c.*, 12 How. 299.

The power to make police regulations for the protection of its citizens against fraud and imposition has not been taken from the States. *Brechbill* v. *Randall*, 102 Indiana, 528; *S. C.*, 52 Am. Rep. 695; *United States* v. *Dewitt*, 9 Wall. 41; *Mann* v. *Illinois*, 94 U. S. 135; *Civil Rights Cases*, 109 U. S. 14.

In the execution of its police powers the State has a right "to enact such legislation as it may deem proper, even in regard to interstate commerce for the purpose of preventing fraud or deception." *Schollenberger* v. *Pennsylvania*, 171 U. S. 14.

In *New* v. *Walker*, 108 Indiana, 365; *S. C.*, 58 Am. Rep. 40, one of these statutes relating to patent rights was held to be valid. To the same effect see *Shires* v. *Commonwealth*, 120 Pa. St. 368; *Reeves* v. *Baker*, 51 Fed. Rep. 785; *Mason* v. *McLeod*, 57 Kansas, 105; *Sandage* v. *Studebaker Co.*, 142 Indiana, 148; *Robertson* v. *Cooper*, 1 Ind. App. 78; *Pinney* v. *First Nat. Bk.*, 75 Pac. Rep. 119; *S. C.*, 78 Pac. Rep. 161; *Hankey* v. *Downey*, 116 Indiana, 119; *Pegram* v. *Am. Alkali Co.* (Pa.), 122 Fed. Rep. 1004; *Haskell* v. *Jones*, 86 Pa. St. 173.

The fact that the statute may indirectly affect patents furnishes no objection to its validity. *Slaughter-House Cases*, 16 Wall. 62.

Since the preparation of the brief on the petition for certiorari in this case, this court has determined the validity of the Arkansas statute in question, at least for the purposes of the present case. *Woods & Sons* v. *Carl*, 203 U. S. 358.

Mr. Morris M. Cohn, for respondent, submitted:

The statute in question is void because of the improper classification made by the exception from the provisions of the act of "merchants and dealers who sell patented things in the usual course of business." *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150; *Connelly* v. *Union Sewer Pipe Company*, 184 U. S. 540; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 179; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236;

Lake Shore Ry. Co. v. *Smith*, 173 U. S. 684; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Minnesota* v. *Barber*, 136 U. S. 313; *Soon Hing* v. *Crowley*, 113 U. S. 709; *Ward* v. *Maryland*, 12 Wall. 418; *Ex parte Deeds*, 75 Arkansas, 542; *Woods* v. *Carl*, 75 Arkansas, 328, 335; *Ex parte Ft. Smith Bridge Co.*, 62 Arkansas, 461; *State* v. *Sheriff, &c.*, 48 Minnesota, 236; *People* v. *Max*, 99 N. Y. 377; *Dickson* v. *Poe*, 159 Indiana, 492; *Hannon* v. *State*, 66 Ohio St. 249; *Brown* v. *Jacobs P. Co.*, 115 Georgia, 429; *In re Flucks*, 157 Missouri, 125; *Stinson* v. *Muskegon Brewing Co.*, 100 Michigan, 347; *Gillespie* v. *People*, 188 Illinois, 176; *Templar* v. *Michigan St. Board*, 90 N. W. Rep. 1058.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court.

The validity of this very statute of Arkansas (at least until Congress legislates upon the subject) has already been affirmed by this court, *Woods & Sons* v. *Carl*, 203 U. S. 358, and the validity of statutes of a somewhat similar nature has also been affirmed in the case of *Allen* v. *Riley*, 203 U. S. 347, immediately preceding the case above cited.

It is sought to avoid the authority of our decision upon this Arkansas statute by asserting that nothing was therein decided, except the validity of the first section of the act, and that the validity of the act when considered in connection with the fourth section was not argued or decided. The fourth section reads as follows: "This act shall not apply to merchants and dealers who sell patented things in the usual course of business." Other reasons for an affirmance are set up in the brief of respondent.

The grounds given for the decision by the Circuit Court and the Circuit Court of Appeals differ somewhat. The Circuit Court says that the effect of the fourth section of the statute is to violate that portion of the Fourteenth Amendment to the Federal Constitution, which provides that no State shall

deny to any person within its jurisdiction the equal protection of the laws; while the Circuit Court of Appeals bases its judgment upon the unlawful discrimination evidenced by the act against those who are protected by a patent granted by the United States.

In 203 U. S. 358, *supra*, this court held the statute valid as against an objection of the same nature as that taken herein by the Circuit Court of Appeals. Our decision in that case had not been made at the time of the decision of this case in the courts below. The ground taken by the Circuit Court was not discussed in our opinion in 203 U. S. and although it might be urged that all objections to its validity arising upon the face of the statute, even if not specially discussed, were overruled by the decision; yet assuming that the particular question now presented is still open in this court, we are of opinion that the exception contained in section four does not render the statute invalid. The plain purpose of the whole statute is to create and enforce a proper police regulation. Its passage showed that the legislature was of opinion that fraud and imposition were frequent in the sale of property of this nature, except in the cases mentioned in § 4, and that temptations to false representations in regard to the virtues and value of the article sold were also frequently yielded to. When the sale of the article was effected by such representations, and a note given for the amount of the sale, a transfer of the note to a *bona fide* purchaser for value before its maturity prevented the vendee from showing the fraud by which the sale had been accomplished. In order to reach such a transaction and to permit the vendee to show the fraud, the statute was passed. It was doubtless thought that merchants and dealers, as mentioned in the statute, while dealing with the patented things in the manner stated, would not be so likely to make representations or to engage in a fraud to effect a sale, as those covered by the statute. The various itinerant vendors of patented articles, whose fluency of speech and carelessness regarding the truth of their representations, might almost be said to have

become proverbial, were, of course, in the mind of the legislature, and were included in this legislation. Indeed they are the principal people to be affected by it.

The manufacturer of a patented article, who also sells it in the usual course of business in his store or factory, would probably come within the exception of § 4. He may be none the less a dealer, selling in the usual course of his business, because he is also a manufacturer of the article dealt in. Exceptional and rare cases, not arising out of the sale of patented things in the ordinary way, may be imagined where this general classification separating the merchants and dealers from the rest of the people might be regarded as not sufficiently comprehensive, because in such unforeseen, unusual and exceptional cases the people affected by the statute ought, in strictness, to have been included in the exception. See opinion of Circuit Court herein, 127 Fed. Rep., *supra*. But we do not think the statute should be condemned on that account. It is because such imaginary and unforeseen cases are so rare and exceptional as to have been overlooked that the general classification ought not to be rendered invalid. In such case there is really no substantial denial of the equal protection of the laws within the meaning of the amendment.

It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, although appropriate and proper upon the general subject upon which such legislation is to act, so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there cannot be an *exact* exclusion or inclusion of persons and things. See *Gulf &c. Co.* v. *Ellis*, 165 U. S. 150, and cases cited; *Missouri &c. Co.* v. *May*, 194 U. S. 267. We can see reasons for excepting merchants and dealers who sell patented things, in the usual course of business, from the provisions of the statute,

and we think the failure to exempt some few others, as above suggested, ought not to render the whole statute void as resulting in an unjust and unreasonable discrimination.

The case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, one of the cases cited by the Circuit Court, is not in our opinion applicable. The statute did not apply to agricultural products or livestock while in the hands of the producer or raiser. It was held that this exemption rendered the statute void, as denying to persons within the jurisdiction of the State the equal protection of the laws. The statute was held to create a classification of an arbitrary nature, applicable to large numbers of people, and yet not based upon any reasonable ground. Those who were exempted from its provisions were numerous and stood practically in the same relation to the subject matter of the statute as did the other class upon whom the statute acted, and no valid reason could be given why, if one were included, the other should be exempted. The same reasons applied to all the classes, and should have led to the same results with regard to all. There was no room for a proper or fair discrimination.

We think there is a distinction, founded upon fair reasoning, which upholds the principle of exemption as contained in the fourth section, and that, consequently, the statute does not violate the Fourteenth Amendment on the ground stated.

The case was decided by the courts below solely upon constitutional grounds, and upon those grounds the decision cannot rest. It must, therefore, be remanded, and if there be any other facts to be urged they can be presented on another trial.

The judgments of the Circuit Court and the Circuit Court of Appeals must be reversed and the case remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

Reversed.